83-1940

NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1983

ARMIN GROSZ, SARA GROSZ and NAFTALI GROSZ,
Petitioners,

vs.

THE CITY OF MIAMI BEACH,
a municipal corporation,
Respondents.

MARVIN SHUSTER, M.D. and
CONGREGATION LEVI YITZCHACK-CHABAD, INC.,
Petitioners,

vs.

THE CITY OF HOLLYWOOD, FLORIDA,
a municipal corporation,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI

SAMUEL I. BURSTYN
MICHEL OCIACOVSKI
Suite 200
3050 Biscayne Boulevard
Miami, Florida 33137
(305) 573-8325

JESSE L. McCRARY, JR. ESQ.
Counsel of Record
8th Floor
3050 Biscayne Boulevard
Miami, Florida, 33137
(305) 576-1500

72 pp

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A MUNICIPALITY MAY RESTRICT THE FREE EXERCISE OF RELIGIOUS BELIEFS WITHOUT ADVANCING OR DEMONSTRATING A COMPELLING STATE INTEREST FOR DOING SO.

II.

WHETHER RELIGIOUS ACTIVITY MAY BE EXCLUDED FROM RESIDENTIAL DISTRICTS BASED ON THE SAME STANDARDS USED TO EXCLUDE COMMERCIAL ENTERPRISES.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

OPINIONS BELOW

The opinion of the Court of Appeals, *Grosz v. City of Miami Beach*, is reported at 721 F.2d 729 (11th Cir. 1983), and is reproduced at Appendix A. The unreported opinion of the District Court is reproduced at Appendix B.

The unreported opinion of the Court of Appeals in *Shuster v. City of Hollywood*, is reproduced at Appendix C. The unreported opinion of the District Court is reproduced at Appendix D.

JURISDICTION

The opinion of the Court of Appeals in *Grosz v. City of Miami Beach* was rendered on December 19, 1983. A timely Petition for Re-Hearing *en banc* was filed. The Petition for Re-Hearing was denied on February 28, 1984. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C.A. §1254(1) (West 1982). This Petition is timely filed under the provisions of Sup. Ct. R. 20.4.

The opinion of the Court of Appeals in *Shuster v. City of Hollywood*, was rendered on February 1, 1984. Petitioners' Motion for Extension of Time within which to file a Petition for Writ of Certiorari was granted by this Court on April 24, 1984. The deadline was extended to conform with the applicable deadline for filing a Petition for Writ of Certiorari in *Grosz v. City of Miami Beach*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1254(1) (West 1982).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

U.S. Const. amend. I.

I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. The pertinent provisions of City of Miami Beach Zoning Ordinance 1891 §6-1, are set forth in Appendix E. The pertinent provisions of City of Hollywood Zoning Ordinance Section II Part 3(B) are set forth in Appendix F.

STATEMENT OF THE CASE

I. *Grosz v. City of Miami Beach.*

Petitioners are required by their religious beliefs to pray twice daily in an assemblage of at least ten adult males. They have strictly observed this religious tenet by conducting the required prayer in their home for at least the last fifty years. Although there is no religious requirement that this prayer occur in a home, Petitioners do so for reasons of health, (Petitioner Naftali Grosz is unable to travel great distances because of his age and other physicial infirmaties); religion, (Petitioners are precluded from driving at all, or from walking great distances, on the Sabbath); and finances, (Petitioners are members of a very small and distinct Judaic sect with few members in South Florida, precluding them from developing their own religious center).

During a specific Sabbath prayer session, a zoning official from the City of Miami Beach served Petitioners with a "Notice of Violation" threatening Petitioners with immediate criminal prosecution if they did not cease praying in their home. This notice was based on complaints received by other city officials concerning noise emanating from Petitioners' home.

Petitioners filed a civil rights suit in Federal District Court against the City seeking declaratory and injunctive relief against the prosecution threatened by the City as a result of their religious activity.[1] The District Court held an extensive evidentiary hearing over three (3) days on Petitioners' request for a preliminary injunction. At that hearing evidence was presented by Petitioners demonstrating the religious basis for their activity. Further, the Petitioners demonstrated conclusively that their home was in no way a center of "organized" religious activity. Indeed, the Petitioners testified without contradiction that no tax exemption is claimed for the property and that no religious or social functions, other than the required gathering of adult males for daily prayer, ever occurs at their home. (Tr. 34, 71-72).[2]

On April 29, 1981, the District Court entered a preliminary injunction enjoining the City from instituting criminal proceedings against the Petitioners based on Petitioners' religious activity.

---

[1]Jurisdiction in the first instance was invoked pursuant to 28 U.S.C.A. §1331 (West 1980); 28 U.S.C.A. §1343(3)(4) (West 1976); and 42 U.S.C.A. §1983 *et. seq.* (West 1976).

[2]"TR." refers to the trial transcript in *Grosz v. City of Miami Beach.*

On January 18, 1982, a conference was held in chambers. At the conference, counsel for the respective parties agreed that all the evidence as to the issues of liability had been presented at the hearing on Plaintiffs Motion for a Preliminary Injunction. The Court nonetheless offered the parties the opportunity to proffer and stipulate to any facts that additional hearings might yield. In response thereto, a joint Stipulation was drafted by counsel and submitted to the Court. That Stipulation is set out in full below below:

> 1. In 1977 plaintiffs, United States citizens, purchased property at 3401 Prairie Drive, Miami Beach, Florida. Naftali and Sarah Grosz use the house as their principal residence, and Armin Grosz lives there during parts of the year. In addition to a house, the property includes a separate building which was previously used as a garage and a recreational room.
>
> 2. For many decades prior to this purchase, the property had been zoned RS-4 by the City, for single-family residential use, and plaintiffs bought the house subject to a standard deed restriction expressly citing this single-family residential restriction. Plaintiffs have not requested rezoning of the property.
>
> 3. Some years after the purchase, plaintiffs applied for permits for internal modifications to the accessory structure, stating that the building would be remodeled for "playroom use." They were specifically informed by the City that the structure could not be remodeled as a religious institution. The accessory structure

was not externally modified, but plaintiffs specifically stocked the inside of the building for group religious services, including benches to seat over 30 persons, Torahs, Arks, a Menorah, skull caps, an eternal light, numerous prayer books, shawls and other items of religious significance. Internally the structure has much of the physical indicia of a small synagogue or "shul", and is not operated as a playroom. Externally the building was not modified.

4. Prior to the remodeling, plaintiffs were aware that Miami Beach Zoning Ordinance No. 1891 had been construed by the City to prohibit churches, synagogues and a similarly organized religious congregations in single-family residential zones, and that this construction had been upheld by the State and Federal trial and appellate courts

5. Naftali Grosz, a Rabbi and the leader of an orthodox Jewish sect, is aged and somewhat infirm but is not immobile. It is a requirement of his religion to conduct religious services twice daily in a congregation of at least ten adult males, and it is convenient for Naftali Grosz to use this structure for that purpose. For many years the Grosz family has conducted group religious services in whichever home they have occupied. Plaintiffs could, however, conduct such services in many other areas within the City of Miami Beach, including an area within four blocks of their home.

6. Most of the congregation at the Grosz home are friends, family members or neighbors. The typical congregation is between ten and twenty males who regularly assemble at the building for religious services. However, occassionally (generally in the winter months and on Saturdays) the congregation contains as many as fifty persons, some of whom are neither friends, family members or neighbors. Plaintiffs do not exclude members of the public from attending these services and on rare occasions, in order to ensure the presence of ten adult males, have solicited persons to attend the services. Because Naftali Grosz is a leader of a particular orthodox Jewish sect, non-residents of Miami Beach who belong to the sect use the accessory building as their principal or sole place of worship [while] visiting South Florida. Naftali Grosz has referred to the congregation as a shul, and a witness, who is a neighbor of plaintiffs, has testified that persons have come to her house asking for directions to the "Grosz shul." Plaintiffs would not refuse contributions for the services, but do not solicit such contributions.

7. The religious services last one-half hour in the morning and one-half hour in the late afternoon every day. On Saturdays and religious holidays each service may take two to three hours. Daily services usually cause no substantial disturbance to the neighborhood, but well attended services have disturbed neighbors as a result of persons seeking directions to the Grosz shul, as a result of chanting and singing

during the services, and as a result of the occasionally large congregations of worshippers at the property.

8. On February 6, 1981, the plaintiffs were given a "notice of violations" by the City threatening prosecution which would result in conviction of a misdemeanor charge. This notice of violation of the zoning ordinance was prompted by citizen complaints to the City.

9. The City did not and would not prosecute plaintiffs for praying in their home with ten friends, neighbors, and relatives, even on a regular basis, but rather because of the specific conduct described above. The City of Miami Beach permits churches, synagogues, and other religious institutions to operate freely in every zoning district of the City except the RS-4 single family district and has enforced the single-family residential limitation equally against Christian, Jewish and "non-traditional" religious groups. Numerous other residential zones of the City's territory, specifically and expressly list churches and synagogues as permitted users [sic].

Based on the evidence presented at the preliminary injunction hearing and on the stipulated facts submitted, the District Court entered an Order on April 8, 1982 holding that the City's zoning ordinance was unconstitutional as applied. The District Court findings indicated that, on the evidence presented, the Petitioners

were praying in their home and not conducting organized religious activity. (App. 38).

The City of Miami Beach appealed this adverse ruling. The Court of Appeals rejected the findings of the District Court and instead found that Petitioners were conducting organized religious services in an institutional setting. (App. 22). The appellate court further held that the use of Petitioners' home as a religious center undermined the City's zoning scheme by creating problems associated with noise, litter, traffic, and spot zoning. (App. 21-22). The Court of Appeals characterized the City's interest as "significant" (App. 21), and after balancing the City's interests when compared to Petitioners' free exercise interests found in favor of the City. The Court of Appeals advanced no compelling State interest for mandating that the Petitioners be required to give up their religious practices.

II. *Shuster v. City of Hollywood.*

The Petitioners in this case are members of an orthodox sect of Judaism. Their religious beliefs preclude them from driving on the Sabbath, or from walking great distances on that day. They also are required to pray twice daily in an assemblage of ten (10) adult males.

In order to facilitate his religious practices, Petitioner, Marvin Shuster, M.D., purchased a house in a residential district (zoned "RA") in the City of Hollywood. Without in any way modifying or altering any of the external features of the home he purchased, Dr. Shuster permitted the structure to be used to facilitate his religious beliefs. The home was used for prayer by

members of Dr. Shuster's sect of Judaism who would not otherwise have been able to practice their religious beliefs.

The City of Hollywood served a Notice of Violation on Dr. Shuster threatening him with criminal prosecution if the prayer sessions did not immediately stop. The Petitioners then filed a civil rights action alleging federal jurisdiction under the provisions of 28 U.S.C.A.§1331 (West 1980); 28 U.S.C.A. §1343(3)(4) (West 1976); and 42 U.S.C.A. §1983 *et. seq.* (West 1976).

On May 7, 1982, a hearing was held on Petitioners' Motion for Preliminary Injunction. After an extensive evidentiary hearing, the Court issued a preliminary injunction prohibiting the City of Hollywood from enforcing its zoning ordinance to prohibit the Petitioners from praying in a residential neighborhood. The City of Hollywood appealed that decision, and the preliminary injunction was reversed and the case remanded to the District Court. The Court of Appeals in its brief judgment relied exclusively on the holding of *Grosz v. City of Miami Beach.*

REASONS WHY THE PETITION SHOULD BE GRANTED

POINT I

The Court of Appeals in the *Grosz* case failed to follow the clear precedents of this Court by allowing a municipality to prohibit an individual from exercising his religious beliefs without first demonstrating a compelling State interest. It has long been the established policy of this Court that a State may inhibit the free exercise of religious beliefs only where State interests of "the highest order" dictate such action. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Both the District Court which upheld Petitioner's right to pray at home and the Court of Appeals which reversed that ruling characterized the municipality's interest in this case only as "significant." (App. 21, 39). This asserted State interest falls short of the required demonstration of a "compelling" State interest. Absent such an interest, the Court of Appeals should not even have balanced the competing State and individual interests, but rather should have affirmed the decision of the district court.

The burden placed upon Petitioners by the challenged ordinances in the *Grosz* case is direct and substantial. *Sherbert v. Verner*, 374 U.S. 398 (1943). The Grosz' must either stop praying according to their religious beliefs or face criminal prosecution. In opposition to these demonstrated interests, the Municipality has advanced its concern regarding noise, litter, and traffic. These interests concededly do not rise to a compelling

level.[3] Thus, the Court of Appeals' decision to uphold a local zoning ordinance in the face of a constitutional challenge was erroneous.

This departure from established precedent significantly reduces the scope of individual liberties in communities with restrictive zoning ordinances. At the preliminary injunction hearing in *Grosz*, counsel for the City of Miami Beach was unable to distinguish the Petitioner's conduct from that of individuals who gathered regularly to play cards, or from persons who permit children from the neighborhood to use a pool in their back yard. (TR. 262-267, 312-314). Under the City's view, all of the described activities could be interpreted as violations of the zoning ordinance, opening the door to even more egregious restrictions of associational rights. For this reason this Court has consistently required the demonstration of a compelling state interest before permitting the infringement of rights protected by the First Amendment. *Reynolds v. United States*, 98 U.S.

---

[3]With regard to these problems, and the record does not disclose any of them exist in these cases, there are numerous less restrictive means available to remedy them without absolutely prohibiting all religious activity. Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981). Should the religious activity create health or fire hazards (as a result of overcrowding for example), the activity could legitimately be curtailed. However, neighbor complaints about increased pedestrian traffic in a residential neighborhood cannot be a justifiable basis to prohibit the free exercise of religious preferences. Requiring Petitioners to "pray elsewhere" because of the religiously based requirement of a gathering of ten men, while permitting prayer by individuals, invites invidious discrimination between religions. Such discrimination is prohibited. *Sherbert v. Verner*. If there are no noise, litter, traffic or other problems, the use of a home for prayer, *a factiari*, does not destroy a comprehensive zoning scheme.

145 (1978), *Prince v. Massachusetts*, 321 U.S. 158 (1944), *United States v. Lee*, 455 U.S. 252 (1982). ("The State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* at 257). No such showing was made in this case. Certiorari should be granted to prevent the dilution of important individual rights as a result of the less restrictive standard outlined by the Court of Appeals in its opinion.

POINT II

The factual situation presented by these cases (especially in the *Shuster* case) presents an important federal question which has not previously been decided by this Court. In both of these cases, individuals purchased existing buildings in residential neighborhoods. The structures still conform in every way to applicable zoning regulations. In both cases, local authorities, based on general zoning ordinances have objected to the *use* of the buildings.[4]

It is well settled that commercial uses of property can be regulated through general zoning schemes if the scheme is rationally related to a legitimate state purpose. *Village of Euclid v. Ambler Realty Company*, 273 U.S. 365 (1926). This includes restricting religious structures which do not conform to local zoning

---

[4]In the *Grosz* case Petitioners emphatically reject the conclusion reached by the Circuit Court of Appeals that the Grosz home is a "synagogue" or otherwise an "organized" religious center. As the Record clearly reflects, the Grosz' use their home to pray in. In the *Shuster* case, Petitioners agree that the structure was fairly characterized as a synagogue.

regulations. *See Corporation of the Presiding Bishop v. City of Porterville*, 338 U.S. 805 (1949) as explained in *American Communications Association v. Douds*, 339 U.S. 382 (1949). *See also, Lakewood Ohio Congregation of Jehovahs Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) which held that a church center with parking spaces for 42 cars could not be built in a residential neighborhood. (It is significant that the *Lakewood* court found that the congregation could purchase any structure already existing in the City of Lakewood to pray in. *Id.* at 307).

This case, however, presents a novel situation in that the structures involved are entirely conforming to the applicable zoning regulations. Accordingly, the issue now presented is whether a Municipality may exclude religious activities from residential areas on the same basis that commercial enterprises are excluded.

It is submitted that the prior decisions of this Court mandate that religious activities be regulated on a standard higher than other commercial enterprises. In *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943), the Court held that a local ordinance which prohibited the distribution of religious leaflets by persons whose religious dictates required such proselytizing was unconstitutional. In so ruling, the Court stated "[t]he constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." *Id.* at 111. The Court clearly distinguished between religious and commercial activity and held that religious activity was to be accorded a deferential status.

The same principle should be applied in this case. If the First Amendment is to continue to occupy the position it has historically been accorded, then municipalities cannot be permitted to constitutionally exclude religious activities from residential neighborhoods on a *per se* basis. Such decisions should be made on a case by case basis.

When the structure to be used for religious activity conforms in all respects to applicable zoning ordinances, and when such use does not present any health, safety or other hazards to the community, then the religious use should continue to be permitted. The standard by which the Courts should determine this issue is one permitting broad latitude to the exercise of freedoms protected by the First Amendment to the Constitution of the United States.

This issue has never been decided and therefore certiorari should be granted.

CONCLUSION

Certiorari should be granted to settle an important issue never previously decided by the Court, and to re-emphasize the strict standards that must be met by a municipality previously religious activity may be prohibited.

Respectfully submitted,

SAMUEL I. BURSTYN, P.A.
Counsel for Petitioners
3050 Biscayne Boulevard
Suite 200
Miami, Florida 33137
Telephone: 305 573-8325

By: /s/ _____

By: _____

JESSE L. McCRARY, JR.
Counsel for Petitioners
3050 Biscayne Boulevard
8th Floor
Miami, Florida 33137

By: /s/ _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Certiorari was served by United States Mail, postage prepaid, to the City Attorney, for the City of Miami Beach, on behalf of the Respondent, CITY OF MIAMI BEACH, and to the City Attorney for the City of Hollywood, on behalf of the Respondent, CITY OF HOLLYWOOD. Service was made on the 25 day of May, 1984.

By: /s/

Appendix

APPENDEX INDEX

Armin GROSZ, Sarah Grosz and Naftali Grosz,
Plaintiffs-Appellees.

v.

The CITY OF MIAMI BEACH, FLORIDA, et al.,
Defendants-Appellants.

No. 82-5476.

United States Court of Appeals,
Eleventh Circuit.

Dec. 19, 1983.

Appeal from the United District Court for the Southern District of Florida.

Before RONEY and ANDERSON, Circuit Judges, and GOLDBERG*, Senior Circuit Judge.

GOLDBERG, Senior Circuit Judge:

This case calls for the accommodation of two important values, both embodied in the spirit and letter of the Constitution: free exercise of religion and the effective use by a state of its police powers. That accommodation consists of a balancing process, leading to a scheme of compromise between the two values that best accords with constitutional mandates. The accommodation we made today, between Appellees'

---

*Honorable Irving L. Goldberg, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

interest in holding religious services in their home and the zoning powers of the City of Miami Beach ("the City"), arises out of the following facts.

I. FACTS

A joint stipulation of facts filed in the court below reveals the background of this case.

1. In 1977 plaintiffs, United States citizens, purchased property at 3401 Prairie Drive, Miami Beach, Florida. Naftali and Sarah Grosz use the house as their principal residence, and Armin Grosz lives there during parts of the year. In addition to a house, the property includes a separate building which was previously used as a garage and a recreational room.

2. For many decades prior to this purchase, the property has been zoned RS-4 by the City, for single-family residential use, and plaintiffs bought the house subject to a standard deed restriction expressly citing this single-family residential restriction. Plaintiffs have not requested rezoning of the property.

3. Some years after the purchase, plaintiffs applied for permits for internal modifications to the accessory structure, stating that the building would be remodeled for "playroom use." They were specifically informed by the City that the structure could not be remodeled as a religious institution. The accessory structure was not externally modified, but plaintiff specifically stocked the inside of the building for group religious services, including benches to seat over 30 persons, Torahs Arks, a Menorah, skull caps, an eternal light, numerous prayer books, shawls, and other items of religious significance.

Internally the structure has much of the physical indicia of a small synagogue or "shul," and is not operated as a playroom. Externally the building was not modified.

4. Prior to the remodeling, plaintiffs were aware that Miami Beach Zoning Ordinance No. 1891 had been construed by the City to prohibit churches, synagogues and a similarly organized religious congregations in single-family residential zones, and that this construction had been upheld by the State and Federal trial and appellate courts.

5. Naftali Grosz, a Rabbi and the leader of an orthodox Jewish sect, is aged and somewhat infirm but is not immobile. It is a requirement of his religion to conduct religious services twice daily in a congregation of at least ten adult males, and it is convenient for Naftali Grosz to use this structure for that purpose. For many years the Grosz family has conducted group religious services in whichever home they have occupied. Plaintiffs could, however, conduct such services in many other areas within the City of Miami Beach, including an area within four blocks of their home.

6. Most of the congregation at the Grosz home are friends, family members or neighbors. The typical congregation is between ten and twenty males who regularly assemble at the building for religious services. However, occasionally generally in the winter months and on Saturdays) the congregation contains as many as fifty persons, some of whom are neither friends, family members or neighbors. Plaintiffs do not exclude members of the public from attending these services and on rare occasions, in order to ensure the presence of ten adult males, have solicited persons to attend the

services. Because Naftali Grosz is a leader of a particular orthodox Jewish sect, non-residents of Miami Beach who belong to the sect use the accessory building as their principal or sole place of worship visiting South Florida. Naftali Grosz has referred to the congregation as a shul, and a witness, who is a neighbor of plaintiffs, has testified that persons have come to her house asking for directions to the "Grosz shul." Plaintiffs would not refuse contributions for the services, but do not solicit such contributions.

7. The religious services last one-half hour in the morning and one-half hour in the late afternoon every day. On Saturdays and religious holidays each service may take two to three hours. Daily services usually cause no substantial disturbance to the neighborhood, but well-attended services have disturbed neighbors as a result of persons seeking directions to the Grosz shul, as a result of chanting and singing during the services, and as a result of the occasionally large congregations of worshippers at the property.

8. On February 6, 1981, the plaintiffs were given a "notice of violation" by the City threating prosecution which would result in conviction of a misdemeanor charge. This notice of violation of the zoning ordinance was prompted by citizen complaints to the City.

9. The City did not and would not prosecute plaintiffs for praying in their home with ten friends, neighbors, and relatives, even on a regular basis, but rather because of the specific conduct described above. The City of Miami Beach permits churches, synagogues, and other religious institutions to operate freely in every zoning district of the City except the RS-4 single-

family district and has enforced the single-family residential limitation equally against Christian, Jewish and "non-traditional" religious groups. Numerous other residential zones of the City, constituting at least 50% of the City's territory, specifically and expressly list churches and synagogues as permitted users.[1]

The "notice of violation", mentioned in the stipulations was issued because of the City's view that Appellees' twice daily performance of religious ceremonies on their property conflicts with use restrictions embodied in City Ordinance No. 1891 § 6-1 ("the Ordinance").[2]

---

[1]Record at 383-85.

[2]City of Miami Beach Zoning Ordinance No. 1891 § 6-1 applicable to the Appellees' property RS-4 classification, provides in relevant part:

B. *Uses Permitted.* No land, water or structure may be used in whole or in part, except for the following uses.

1. Single-family detached dwelling.

* * *

3. Accessory uses of above uses.

"Single-family dwelling" is defined at § 3-1 of the ordinance as "a building designed for or occupied exclusively by one family." "Accessory use" is defined at § 3-2 as "a subordinate use which is incidental to and customary in connection with the main building or use and which is located on the same lot with such main building or use." The City reasoned that the omission of organized religious centers as permitted uses under § 6-1, while various other of the City's zoning classifications specifically allow operation of houses of worship, made Appellees' activities a clear use violation.

This conclusion stems from the City's position that religious ceremonies conducted on the Grosz property occasionally constitute organized, publicly attended religious services.[3]

II. PROCEDURE BELOW AND ISSUE ON APPEAL

Appellees sued the City in the United States District Court for the Southern District of Florida, seeking a determination that the ordinance is unconstitutional on its face because of overbreadth and vagueness, and unconstitutional as it was sought to be applied to them. Appellees prayed for declaratory and injunctive relief and damages. Following an evidentiary hearing, the district court granted a preliminary injunction which restrained the City from bringing criminal prosecutions against Appellees based on "conduct or circumstances which were the subject of the notice of violation." The court denied the parties' cross motions for summary judgment, finding that genuine issues of material fact still existed. Because both parties were determined to resolve the case in a summary procedure, they prepared and filed the joint stipulation of facts reproduced above. Based on these stipulations, the trial court granted summary judgment as to the merits of plaintiffs' claims. The court found the ordinance neither vague nor overbroad, and thus not facially unconstitutional. However, the

---

[3]The joint stipulations of fact contain the following sentence: "The City did not and would not prosecute plaintiffs for praying in their home, with ten friends, neighbors and relatives, even on a regular basis, but rather because of the conduct described above." Regardless of the City's intent as to prosecutions for "other kinds" of conduct, we limit today's ruling to the City's actions regarding specific conduct documented in this case.

City's application of the zoning code was found to impose a burden on Appellees' free exercise of religion. Concluding that the City's interest in enforcing its zoning laws did not rise to the level of a competing state interest, the court held the Ordinance to be unconstitutional as applied. This appeal follows.

The issue facing this Court is whether the trial court properly balanced the competing governmental and religious interests.[4] Because we conclude that the court below erred in its balancing, we reverse the finding of unconstitutionality.

III. AN EXPEDITION INTO FREE EXERCISE DOCTRINE

Interpretation and application of the free exercise clause has created, within that field of constitutional doctrine, areas dotted by unanswered questions. Fortunately, those unanswered questions do not hinder resolution of the issues in this case. A tour through the

---

[4]The Constitution's protection of religious freedom derives most directly, of course, from the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." The free exercise clause of the First Amendment, relevant in this case, gains application to state and local governments through the Fourteenth Amendment's due process clause. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

That states and localities should be able to effectively exercise police powers to benefit their citizens is implicit throughout the structure of the Constitution. In particular, the Tenth Amendment supports the exercise of such powers: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."

doctrine including the areas of uncertainty, will serve, however, to highlight the reasons behind our confidence of result in this case. In the course of this tour, we first traverse the surface of two threshold principles of free exercise doctrine. We then turn to the doctrinal centerpiece, balancing itself, and discuss the weighing of government interests, the weighing of religious interests, and the reaching of a final equilibrium.

A. Thresholds

[1] Before a court balances competing governmental and religious interest, the challenged government action must pass two threshold tests. The first test distinguishes government regulation of religious beliefs and opinions from restrictions affecting religious conduct. The government may never regulate religious beliefs; but, the Constitution does not prohibit absolutely government regulation of religious conduct. Given a regulation's focus on conduct, government action passes this first threshold. *Braunfeld v. Brown*, 366 U.S. 599, 603, 81 S.Ct. 1144, 1146, 6 L.Ed.2d 563 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).[5]

---

[5]The belief/conduct distinction has survived, *see, e.g., United States v. Middleton*, 690 F.2d 820, 824 (11th Cir.1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1497, 75 L.Ed.2d 929; *United States v. Holmes*, 614 F.2d 985, 989 (5th Cir. 1980), despite criticism by commentators, *see* L.Tribe, *American Constitutional Law*, §14-9, at 837-38 (1978) and Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I The Religious Liberty Guarantee*, 80 Harv.L.Rev. 1381, 1387 (1967).

[2, 3] The second threshold principle requires that a law have both a secular purpose and a secular effect to pass constitutional muster. First, a law may not have a sectarian purpose—governmental action violates the Constitution if it is based upon disagreement with religious tenets or practices, or if it is aimed at impeding religion. *Braunfeld v. Brown, supra*, 366 U.S. at 607, 81 S.Ct. at 1148. Second, a law violates the free exercise clause if the "essential effect" of the government action is to influence negatively the pursuit of religious activity or the expression of religious belief. *Id.* This is not to say that any government actions significantly affecting religion fail this threshold test. Rather, any nonsecular effect, regardless of its significance, must be only an incident of the secular effect.[6] Past these two thresholds, we not begin our journey into balancing.

B. Balancing

[4] If a government action challenged under the free exercise clause survives passage through the belief/conduct and secular purpose and effect thresholds, the court then faces the difficult task of balancing government interests against the impunged religious interest. This constitutional balancing is not a simple process. We gain some sense of direction, however, from one basic principle: the balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity. This principle marks the path of least impairment of constitutional values. And, although

---

[6]L. Tribe, *supra note* 5, §14-9 at 838-40.

previous court balancings provide us more detailed guidance in assigning weights to the competing values, the balancing map is far from complete. While we turn to examine previous precedent for the guidance that it can supply, we must keep in mind that our journey is into an area of the free exercise landscape where solid ground occasionally gives way to crevices of uncertainty.

[5] *1. The Burden on the Government.* — In general, the burden on the governmental interest depends upon the importance of the underlying policy interests and the degree of impairment of those interests if the regulation were changed to impose no burden on religious conduct. One principle that has emerged in free exercise doctrine reflects the logic of our calculus. That is simply, if the government can effectuate its policy through a nonburdening technique the degree of impairment equals zero. In *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), the Supreme Court reversed the convictions of three Jehovah's Witnesses for breach of the peace and for soliciting contributions without a state certificate. The defendants' conduct consisted of going house to house and playing an anti-Catholic record to those who would listen. In reversing the convictions, the Supreme Court reasoned that the government's actions went beyond the least drastic, most narrowly constructed means of accomplishing state goals. Prevention of fraud and maintenance of public safety were held to require neither a discretionary licensing system for religious solicitation, nor arrest of nonthreatening, nonabusive individuals for breach of the peace. The government did not need to burden religious practice to accomplish its secular goals.

In cases like *Cantwell*, where the government suffers no burden in changing its actions to accommodate religious conduct, any sectarian interest regardless of how lightly it weighs wins the balancing. Properly analyzed, therefore, the least restrictive means test constitutes just a special application of the general balancing test.

Free exercise doctrine suggests another step in implementing the government burden formula outlined above: we must next consider the impact of a specific, regligion-based exception upon government's policy objectives. In contrast to the clarity of the least restrictive means test, however, ambiguities pervade the standard for determining whether a religion-based exception is constitutionally mandated. In *Braunfeld v. Brown*, *supra*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563, the Supreme Court upheld Pennsylvania's Sunday retail sales prohibition against a free exercise challenge. A merchant and member of the Orthodox Jewish Faith claimed that the mandated Sunday closing prevented him from compensating for the business that he lost by following his faith's command that he not work on Saturday. In rejecting his contention that the state must grant a religion-based exception to the Sunday closing laws, the court was deferential to government assertions that any exception would be unworkable. The court relied on "reason and experience" in concluding that potential problems in administration and enforcement necessitated the law's blanket application.

In contrast, *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), while declining to overrule *Braunfeld* in any respect, applied a religious exception standard much more exacting of the government. *Sherbert* struck down a state's application

of its law where the effect was to pressure a worker to abandon her religious convictions regarding the day of rest. The worker had been discharged from her job because of her refusal to work on Saturday, the Sabbath day of her faith. Application of the state's unemployment compensation eligibility rules resulted in denial of her claim for unemployment compensation benefits. In discussing the government's asserted interests in not granting an exception to the eligibility regulations the Court rejected, as unsupported by any proof in the record, the contention that an exception would induce fraudulent compensation claims based on feigned religious objections. Government arguments that administrative problems would result from having to determine the legitimacy of exemption claims and that granting exceptions would undermine the soundness of the unemployment fund also failed to impress the Court.

But then, in *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), government arguments similar to the ones that failed in *Sherbert* convinced the Court that a religion-based exception to a challenged law would be too costly. The free exercise claim in *Lee* stemmed from the federal government's collection of social security taxes from all employers. Although the payment of social security taxes violated the religious beliefs of the Amish, the Court held that the government's interest in the integrity of the social security system outweighed the burden on religion. The rejection of a religion-based exception rested explicitly upon concerns about the potential impact of such an exception on the program's fiscal soundness.

Conflicting indications from *Sherbert* on one hand and *Braunfeld* and *Lee* on the other leave open important

questions as to when a religious exemption is mandated: How much weight should be given the potential for feigned religious claims for exemption? To what extent can a court consider administrative costs and inconvenience as opposed to necessary impairment of the primary policy goal? Generally, what degree of impact upon the government's broad policy goal should be tolerated before rejecting exceptions?

[6] 2. *The Burden on Religion.*—Having examined existing guidelines for measuring the burden on government, our journey changes direction and we turn to the religion side of the calculus. The formula for calculating the burden on religion essentially parallels the formula used to figure the government's burden. The importance of the burdened practice within the particular religion's doctrines and the degree of interference caused by the government both figure into the calculus. Symmetry between the government burden formula and the religion burden formula is not complete, however. Although a focus on the importance of a religious belief occasionally proves instructive,[7] the determination of how important the practice is can prove more difficult than evaluating the importance of a government policy. Religious doctrine may exist, to a large extent, as a reflection of individually adherents' interpretations. Reliable indicia of the importance of particular religious conduct may be hard to find. Courts, therefore, often restrict themselves to determining whether the challenged conduct is rooted in religious belief or involves only secular, philosophical or personal

---

[7]*See Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 321 (1977) (Goldberg, J., specially concurring).

choices. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 215-216, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *EEOC v. Mississippi College*, 626 F.2d 477, 488 (1980). Only conduct flowing from religious belief merits free exercise protection; no weight measures on the side of religion unless the government action ultimately affects a religious practice. This latter determination is also difficult, but it is one that must be made in all free exercise challenges. *Wisconsin v. Yoder, supra*, 406 U.S. at 215-216, 92 S.Ct. at 1533. *Id.* Finer distinctions, as to the *weight* of the burden, must usually be based upon the degree of interference element in the formula.

Focusing on the degree of interference factor, it is clear that when the government totally precludes religious conduct by imposing criminal sanctions, the burden weighs at its heaviest. *See Wisconsin v. Yoder, supra*, 406 U.S. at 215, 92 S.Ct. at 1533; *Cantwell v. Connecticut, supra*, 310 U.S. at 307-308, 60 S.Ct. at 904-905. Less clear is how courts are to estimate the burden on religion when the government does not criminally prohibit religious conduct but infringes upon free exercise in some other way. In *Braunfeld v. Brown, supra*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563, the Supreme Court appeared to indicate that burdens on religion, other than affirmative impositions of criminal penalties, weigh lightly against government interests. Creating a direct/indirect dichotomy with which to classify burdens on religion, the Court said:

> In [cases where religious practices conflict with the public interest], to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, [citations omitted] because resolution in favor of the State results in

> the choice to the individual of either abandoning his religious principle or facing criminal prosecution. But . . . this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive.

Braunfeld v. Brown, supra, 366 U.S. at 605, 81 S.Ct. at 1147. The Court further noted that to strike down legislation which imposes only indirect burdens would, absent the most critical scrutiny, "radically restrict the operating latitude of the legislature." *Id.* This distinction led to a conclusion that,

> if the State regulates conduct by enacting a general law within its power, the purpose and effect which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Id. at 1148. Under such an analysis the real-world impact of a burden—in *Braunfeld*, the merchant's choice between his religion and his business—becomes a second level inquiry. By creating a presumption of validity for laws meeting the secular purpose and effect standard and imposing only indirect burdens, *Braunfeld* produced a wide fissure through which certain government actions can escape thorough-going balancing.

The Supreme Court moved to narrow the width of that fissure two years later in *Sherbert v. Verner*,

supra, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965. The state's defense of its unemployment compensation eligibility rules centered on the fact that the burden on religious conduct did not result from criminal liability. Rather, the state maintained that the burden on religious conduct flowed "indirectly" from state welfare legislation. The Court rejected this argument in broad terms.

> Here not only is it apparent that appellant's declared ineligibility for benefits derived solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert v. Verner, *supra*, 374 U.S. at 404, 83 S.Ct. at 1794. Recently, the Court employed identical reasoning to strike down a state's denial of unemployment compensation benefits when a worker quit because of religious objections to working in his employer's weapons production department. *Thomas v. Review Board of the Ind. Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). Although *Sherbert* specifically avoids overruling *Braunfeld*, combined with *Thomas* it significantly transforms *Braunfeld's* direct/indirect distinction. Affirmative imposition of criminal penalties no longer distinguishes direct from indirect governmental burdens. Absent the illumination that the penalty versus benefit distinction provided,

the contours and consequences of the direct/indirect distinction are less obvious. It is especially unclear whether *Braunfeld* still creates presumptive validity for governmental actions that impose only indirect burdens.[8] No Supreme Court case since *Braunfeld* has relied on the direct/indirect rhetoric to uphold governmental action.

One unifying principle for calculating the burden on religion remains intact, however. Governmental actions that burden religious conduct by focusing on the conduct itself, regardless of whether the action constitutes an imposition of a penalty or a denial of a benefit, impose heavy burdens on religion.

3. The Final Balance.—In our examination of the methods by which burdens on government and religion are calculated two principles surfaced that merit repetition here. The first flows from the least restrictive means test. When the government can as easily achieve its policy objective without burdening religious conduct, the burden on the government is zero and the scale necessarily reads against upholding the government action. Similarly, the second principle operates when the burden on religion is zero. Where the burden imposed by the government rests on conduct rooted only in secular philosphy or personal preference, the scale always reads in favor of upholding the government action.

---

[8]At the very least the *word* "indirect" does not signal presumptive validity of a law as it did in *Braunfeld*. In striking down Indiana's denial of unemployment benefits to an individual who quit his job because of religious convictions, the Court said. "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas, supra*, 450 U.S. at 718, 101 S.Ct. at 1432.

[7] Another principle appears if we re-examine the Supreme Court's balancings in *Sherbert v. Verner, supra*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, *Thomas v. Review Board of the Ind. Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624, and *Wisconsin v. Yoder, supra*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15. The Supreme Court suggests in *Sherbert* and *Thomas* that once a government action passes the threshold tests of conduct focus and secular purpose and effect, a showing of "compelling state interest" on the government side will justify inroads on religious liberty. *Yoder* articulates the standard differently, referring to "interests of the highest order." Substantively, however, the same message emanates from all three cases. If avoiding the burden on government rises to the very upper ranges of government interest, a free exercise challenge will fail.

Beyond this basic principle, though, we must make our way without the guiding beacons of sure and certain legal principles. When the government interest in continuing an action that burdens religion does not rise to those upper ranges, the standards are vague as to what government interests will counterbalance free exercise interests. In *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), individuals, who opposed the Vietnam War on the grounds of conscience and religion and desired exemption from military service, asserted that the government's restriction of conscientious objector status to those who objected to all war rather than a particular war violated their free exercise rights. The Court held the government's "substantial" interest in maintaining a fair and evenhanded system of exempting individuals

from military service sufficient to override the asserted burden on religion.

Johnson v. Robison, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) indicated that a whole range of government interests can justify burdening religion, the requisite level depending upon the significance of that burden. There, the free exercise challenge involving the government's denial of veteran's educational benefits to conscientious objectors who performed alternative civilian service failed. The government's interest proved to be of a "kind and weight" to justify the very minor burden on religion. This language suggests that an *ad hoc* balancing is appropriate when existing, broad principles do not command the result.

Viewed collectively, relevant Supreme Court cases provide only the most general hints for reaching a proper, final balance of free exercise and government interests. Little background exists as to what constitutes a "substantial" government interest. And, courts called upon to make an *ad hoc* balance receive precedent guidance only in the discrete factual contexts involved in prior balancings.

IV. A REPEAT TRIP: THE BALANCE IN THIS CASE

[8] We know now at least the broad contours of the path we must follow in making an accommodation between the City's interest in zoning enforcement and Appellees' free exercise interest. We must first apply the conduct/belief and secular effect and purpose tests. Should the government action pass these tests we then must balance the cost to the government of altering its

activity to allow the religious practice to continue unimpeded against the cost to the religious interest imposed by the government action.

A. Thresholds

In this case, the thresholds pass quickly beneath our feet. The City's zoning law affects prayer and religious services, and so involves conduct. Therefore, balancing not absolutism is appropriate. That the law has both secular purpose and effect is noncontroversial. No one contends that zoning laws are based upon disagreement with religious tenets or are aimed at impeding religion. Similarly, given zoning's historical function in protecting public health and welfare, *see Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), and the incidental nature of the asserted burden on religion, the essential effect of zoning laws is clearly secular.

B. The Burden on Government

The City of Miami asserts a governmental interest in enforcing its zoning laws so as to preserve the residential quality of its RS-4 zones. By so doing the City protects the zones' inhabitants from problems of traffic, noise and litter, avoids spot zoning, and preserves a coherent land use zoning plan. The Supreme Court has acknowledged the importance of zoning objectives, stating that segregation of residential from nonresidential neighborhoods "will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children by reducing traffic and resulting confusion, . . . decrease noise . . . [and] preserve a more favorable environment in which to raise children."

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394, 47 S.Ct. 114, 120, 71 L.Ed. 303 (1926). *See also, Village of Belle Terre v. Boraas, supra*, 416 U.S. at 9, 94 S.Ct. at 1541. The City asserts a significant governmental objective in the case at bar.

Gatherings for organized religious services produce, as do other substantial gatherings of people, crowds, noise and disturbance. In fact, the parties' stipulations reveal that the City was acting pursuant to neighbors' complaints to end the disturbance caused by Appellees' conduct. Given this total inconsistency between the accomplishment of the City's policy objectives and the continuance of Appellees' conduct, the government action in this case easily passes the least restrictive means test.

Doctrine also requires that we consider the impact of a religious based exemption to zoning enforcement. The discussion regarding the least restrictive means standard reveals that in this case, granting such an exception would defeat City zoning policy in all neighborhoods where that exception was asserted. Maintenance of the residential quality of a neighborhood requires zoning law enforcement whenever that quality is threatened. Moreover, no principled way exists to limit an exception's costs just to the harm it would create in this case. Crowds of 500 would be as permissible as crowds of 50. Problems of administering the exception such as distinguishing valid religious claims from feigned ones, therefore, need not even be considered. A religion based exception would clearly and substantially impair the City's policy objectives. Together, the important objectives underlying zoning and the degree of infringement of those objectives caused by allowing

the religious conduct to continue place a heavy weight on the government's side of the balancing scale.

C. The Burden on Religion

In calculating the burden on religion, we first determine whether the conduct interfered with constitutes religious practice. The religion of Appellee, Naftali Grosz, requires him to conduct religious services twice daily in the company of at least ten adult males. Solicitation of neighborhood residents to attend and the participation of congregations larger than ten, the conduct on which the City based its notice of violation, are not integral to Appellees' faith. However, the trial judge made no findings, and the record is not clear regarding the extent to which, if any, these objectionable but nonessential practices aid Appellees in gathering ten men and conducting the required services. We assume *arguendo*, therefore, that the nonessential practices further the religious conduct. We must also assume, then, that Appellees suffer some degree of burden on their free exercise rights.

Turning to the significance of that burden, we note that Miami Beach does not prohibit religious conduct per se. Rather, the City prohibits acts in furtherance of this conduct in certain geographical areas. The relevant question is to what degree does the City's exclusion of Appellees' activities from RS-4 zoned areas burden religious conduct. The City's zoning regulations permit organized, publicly attended religious activities in all zoning districts except the RS-4 single family districts. The zones that allow religious institutions to operate constitute one half of the City's territory. Appellees' home lies within four blocks of such a district. Appellees

do not confront the limited choice of ceasing their conduct or incurring criminal liability. Alternatively, they may conduct the required services in suitably zoned areas, either by securing another site away from their current house or by making their home elsewhere in the city. We cannot know the exact impact upon Appellees, in terms of convenience, dollars or aesthetics, that a location change would entail. The burden imposed, though, plainly does not rise to the level of criminal liability, loss of livelihood, or denial of a basic income sustaining public welfare benefit.[9] In comparison to the religious infringements analyzed in previous free exercise cases the burden here stands towards the lower end of the spectrum.

D. The Final Balance

In discussing the process for reaching a final balance we noted earlier that courts are frequently forced to undertake an *ad hoc* balancing when existing free exercise doctrine does not command a specific result. But, such *ad hoc* balancings need not always be based only on appeals to a court's basic intuitive sense. Fortunately, the instant case arises in a factual context in which substantial, relevant case precedent exists to guide our balancing. This case is not the first to involve balancing government's interest in restricting the location of religious conduct. *Prince v. Massachusetts, supra,*

[9]*See Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (criminal liability); *Gillette v. United States* 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (criminal liability); *Braunfeld v. Brown, supra*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (loss of livelihood); *Sherbert v. Verner, supra*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (loss of unemployment compensation).

321 U.S. at 169, 64 S.Ct. at 443, upheld the convictions of a Jehovah's Witness for violating child labor laws. State law prohibited children from selling anything in the streets. The defendant, the custodian of a nine-year-old girl, asserted the child's free exercise rights to sell religious literature on public streets. The defendant claimed that the child's distribution of literature accorded with religious tenets of the Jehovah's Witness faith. The Supreme Court held the state's interest in children's welfare permitted the state to wholly prohibit children from selling religious literature on the streets. With respect to adults, the Court observed that although the literature distribution could not be altogether banned, it could be "regulated within reasonable limits in accommodation to the primary and other incidental uses [of streets]." *Id.* at 169, 64 S.Ct. at 443.

International Society for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979) involved the Society's First Amendment challenge to a municipally owned airport's restrictions on distribution of literature and solicitation of funds. Accepting the Society's claim that religious tenets required followers to solicit funds, this Court nevertheless upheld the airport restrictions. Government may regulate place and manner of religious expression as long as there is no content classification and so long as the regulation is reasonable. *Id.* at 827. Admittedly, restriction of religious conduct on public streets and in airports is less burdensome than restriction of such conduct on an individual's property. The *Prince* and the *Krishna* cases, however, establish the principle that government can exercise its police powers to limit the place and manner of religious conduct, despite a significant burden on free exercise.

A decision from the Sixth Circuit, *Lakewood Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (1983), *cert. denied*, gave that principle specific application in a zoning context. In *Lakewood*, a church congregation challenged a zoning ordinance that prohibited their building a church on a lot they had previously purchased. The Sixth Circuit characterized the infringement on religious freedom as an "inconvenient economic burden" and a "subjective aesthetic burden." The City of Lakewood's interest in creating residential districts to promote its citizens' health and well being was held to outweigh the congregation's religious interests. We think *Lakewood's* balancing process reached the correct result in a case very similar to this one. The Sixth Circuit faced, if anything, a closer balance than the one called for today—as opposed to the one half of Miami Beach territory where Appellees may conduct their religious services, the City of Lakewood permits church buildings on only around ten percent of its land.

We glean a final bit of support for our holding from a Supreme Court dismissal for want of a substantial federal question in *Corporation of the Presiding Bishop v. City of Porterville*, 338 U.S. 805, 70 S.Ct. 78, (1949). The state court had held that churches may be excluded from residential areas consistently with the free exercise clause. Justice Vinson, writing in a later case, *American Communications Ass'n v. Douds*, 339 U.S. 382, 397, 70 S.Ct. 674, 94 L.Ed. 925 (1950), explained the Supreme Court's dismissal in the California case.

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring

a showing of immenent danger to the security of the nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain areas.

V. CONCLUSION

Our journey at an end, we now examine the scale and determine how the two conflicting constitutional values, free exercise rights and the state police power, are to be accommodated. On the free exercise side of the balance weighs the burden that Appellees bear of conducting their services in compliance with applicable zoning restrictions or relocating in a suitably zoned district. Countering on the government's side is the substantial infringement of the City's zoning policy that would occur were the conduct allowed to continue. The *Prince* and *Krishna* analysis regarding time, manner, and place restrictions on religion supports the view that the relative weights of the burdens favor the government. The Supreme Court's pronouncement in *Douds* argues even more strongly for this conclusion.

The judges who have precedentially performed balancings on the free exercise trapeze have encountered great difficulty with the weights and measures involved. Balancings must avoid constitutionalizing secularity or sectarianizing the Constitution. In this area, where religious guarantees of the Constitution compete with the rights of government to perform its function in the modern era, certitude is difficult to attain. All should understand that we have not written today for every situation in which these issues might arise—only that

we have done our best as amateur performers in solving this very, very delicate problem. We who perform on this flying trapeze may not always be daring and young, but we must avoid that slip that could take us into the doctrinal confusion below.

We find that the burden upon government to allow Appellees' conduct outweighs the burden upon the Appellees' free exercise interest. Therefore, we reverse the trial court judgment as to the Ordinance's unconstitutionality as applied. We remand to the district court with instructions to enter judgment in favor of the City.

REVERSED and REMANDED.

[FILED APR 8 1982]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-608-Civ-JE

ARMIN GROSZ, SARAH GROSZ,
and NAFTALI GROSZ,

Plaintiffs,

vs.

THE CITY OF MIAMI BEACH, FLORIDA, a minicipal corporation,

Defendant.

ORDER

This is an action for declaratory and injunctive relief, and damages. Plaintiffs seek a determination that City of Miami Beach Zoning Ordinance No. 1891 §6-1 is unconstitutional on its face, alleging to it be vague and overbroad, and that it is unconstitutional as it is sought to be applied to them.

Plaintiffs allege that the ordinance deprives them of their rights of freedom of religion, speech, assembly, and the right of privacy in the home without fear of criminal prosecution or harassment under color of law.

Jurisdiction is based upon 28 U.S.C. §1331 and 28 U.S.C. §1343.

On April 29, 1981, this Court entered a preliminary injunction restraining the City of Miami Beach from instituting criminal prosecutions against plaintiffs based on the conduct or circumstances which were the subject of the notice of violation issued to plaintiffs by the City.

The action was brought against the City of Miami Beach, its mayor and vice mayor, the city commissioners, city manager, city attorney, code enforcement director, and the state attorney of Dade County, Florida. On July 30, 1981, the claim against the state attorney was dismissed without prejudice. On January 26, 1982, this Court granted the motion to dismiss as to all remaining defendants except the City of Miami Beach. Therefore at this time the only defendant in the action is the City of Miami Beach.

The cause is before the Court upon cross-motions for summary judgment. On January 26, 1982, the motions were denied, as there existed genuine issues of material fact to be tried.

The parties have informed the Court that all evidence intended to be presented was introduced at the hearing on preliminary injunction. They have expressed their desire to resolve the issues in a summary procedure. Therefore, with the approval of this Court, counsel have prepared and filed a joint stipulation of facts which furnishes a basis for resolution of the prayers for declaratory and injunctive relief.

Joint Stipulation of Facts

1. In 1977 plaintiffs, United States citizens, purchased property at 3401 Prairie Drive, Miami Beach, Florida. Naftali and Sarah Grosz use the house as their principal residence, and Armin Grosz lives there during parts of the year. In addition to a house, the property includes a separate building which was previously used as a garage and a recreational room.

2. For many decades prior to this purchase, the property has been zoned RS-4 by the City, for single-family residential use, and plaintiffs bought the house subject to a standard deed restriction expressly citing this single-family residential restriction. Plaintiffs have not requested rezoning of the property.

3. Some years after the purchase, plaintiffs applied for permits for internal modifications to the accessory structure, stating that the building would be remodeled for "playroom use." They were specifically informed by the City that the structure could not be remodeled as a religious institution. The accessory structure was not externally modified, but plaintiffs specifically stocked the inside of the building for group religious services, including benches to seat over 30 persons, Torahs, Arks, a Menorah, skull caps, an eternal light, numerous prayer books, shawls, and other items of religious significance. Internally the structure has much of the physical indicia of a small synagogue or "shul," and is not operated as a playroom. Externally the building was not modified.

4. Prior to the remodeling, plaintiffs were aware that Miami Beach Zoning Ordinance No. 1891 had been

construed by the City to prohibit churches, synagogues and similarly organized religious congregations in single-family residential zones, and that this construction had been upheld by the State and Federal trial and appellate courts.

5. Naftali Grosz, a Rabbi and the leader of an orthodox Jewish sect, is aged and somewhat infirm but is not immobile. It is a requirement of his religion to conduct religious services twice daily in a congregation of at least ten adult males, and it is convenient for Naftali Grosz to use this structure for that purpose. For many years the Grosz family has conducted group religious services in whichever home they have occupied. Plaintiffs could, however, conduct such services in many other areas within the City of Miami Beach, including an area within four blocks of their home.

6. Most of the congregation at the Grosz home are friends, family members or neighbors. The typical congregation is between ten and twenty males who regularly assemble at the building for religious services. However, occasionally (generally in the winter months and on Saturdays) the congregation contains as many as fifty persons, some of whom are neither friends, family members or neighbors. Plaintiffs do not exclude members of the public from attending these services and on rare occasions, in order to ensure the present of ten adult males, have solicited persons to attend the services. Because Naftali Grosz is a leader of a particular orthodox Jewish sect, non-residents of Miami Beach who belong to the sect use the accessory building as their principal or sole place of worship while visiting South Florida. Naftali Grosz has referred to the congregation as a shul, and a witness, who is a neighbor

of plaintiffs, has testified that persons have come to her house asking for directions to the "Grosz shul." Plaintiffs would not refuse contributions for the services, but do not solicit such contributions.

7. The religious services last one-half hour in the morning and one-half hour in the late afternoon every day. On Saturdays and religious holidays each service may take two to three hours. Daily services usually cause no substantial disturbance to the neighborhood, but well-attended services have disturbed neighbors as a result of persons seeking directions to the Grosz shul, as a result of chanting and singing during the services, and as a result of the occasionally large congregations of worshippers at the property.

8. On February 6, 1981, the plaintiffs were given a "notice of violation" by the City threatening prosecution which would result in conviction of a misdemeanor charge. This notice of violation of the zoning ordinance was prompted by citizen complaints to the City.

9. The City did not and would not prosecute plaintiffs for praying in their home with ten friends, neighbors, and relatives, even on a regular basis, but rather because of the specific conduct described above. The City of Miami Beach permits churches, synagogues, and other religious institutions to operate freely in every zoning district of the City except the RS-4 single-family district and has enforced the single-family residential limitation equally against Christian, Jewish and "non-traditional" religious groups. Numerous other residential zones of the City, constituting at least 50% of the City's territory, specifically and expressly list churches and synagogues as permitted uses.

The Constitutional Challenge

Vagueness

Plaintiffs contend that Ordinance No. 1891 §6-1 does not delineate clearly the activities which are violative; that enforcement is left entirely to the discretion of the enforcement officials.

The City asserts that the ordinance contains sufficient definition of permitted and non-permitted uses of property to put plaintiffs on notice that their activities violate the ordinance.

Ordinance No. 1891 §6-1, dealing with single-family residential districts RS-1 through RS-4, provides in part as follows:

> b. *Uses Permitted.* No land, water or structure may be used in whole or in part, except for the following uses:
>
> 1. Single-family detached dwelling.
>
> * * *
>
> 3. Accessory uses of above uses.

"Single-family dwelling" is defined at §3-1 as "a building designed for or occupied exclusively by one family."

"Accessory use" is defined at §3-2 as "a subordinate use which is incidental to and customary in connection

with the main building or use and which is located on the same lot with such main building or use."

"Churches" and "synagogues" are not defined in the code, however §3-1 provides that "words and terms not defined herein shall be interpreted in accord with their normal dictionary meaning and customary usage."

Webster's New International Dictionary defines a "church" as "a building set apart for public worship." It defines a "synagogue" as "a building or place of assembly used by Jewish communities primarily for religious worship."

The City asserts that operation of a church, synagogue, house of worship or organized religious center is not a use incidental to or customary for a single-family dwelling. The City acknowledges that praying in a home does not constitute operation of a church or a non-residential use.

In the First Amendment area government may regulate only with narrow specificity. As a matter of due process, no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. A statute or ordinance must fall if men of common intelligence must necessarily guess at its meaning. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 48 L.Ed.2d 243, 253 (1976).

With respect to the ordinance in the present action, men of common intelligence need not guess at what is meant by a church or synagogue. Essentially they are buildings or places set aside for public or community

worship. It also appears clear that while such uses are specifically allowed in many zoning districts of the city, they are not included as permissible uses in RS-4, the type of district in which plaintiffs' property is located.

By the ordinance plaintiffs are put on notice that they may not use their dwelling as a "church" or "synagogue." The ordinance is not void for vagueness.

Overbreadth

Plaintiffs assert that the ordinance is overbroad and may be applied indiscriminately by the City to prohibit conduct constitutionally protected. More specifically, plaintiffs assert that the ordinance may be used to prevent individuals from assembling in their homes on a regular basis for any purpose whatsoever.

A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. *NAACP v. Alabama*, 377 U.S. 288, 307, 12 L.Ed.2d 325, 338 (1964).

Claims of facial overbreadth have been entertained in some cases, such as those involving statutes which, by their terms, seek to regulate "only spoken words;" those in which rights of association are ensnared in statutes which, by their broad sweep, might result in burdening innocent associations; or those in which statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct. *See Broadrick v. Oklahoma*, 413 U.S. 601, 37

L.Ed.2d 830 (1973), and cases cited therein. However the doctrine has been employed sparingly.

> Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. [citations omitted] Equally important, overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct. *Id.* at 841.

As an example of the last statement, in *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213 (1940), a Jehovah's witness was convicted of common-law breach of the peace for playing a phonograph record attacking the Catholic Church before two Catholic men on the street. The Court reversed the conviction, but only on the ground that the conduct, "considered in the light of the constitutional guarantees," could not be punished under "the common law offense in question." The Court did not hold that the offense "known as breach of the peace" must fall in toto because it was capable of some unconstitutional applications. *Broadrick v. Oklahoma*, *supra.*, at 841.

In the present action, §6-1 permits the use of RS-4 properties for single-family residential dwellings and those incidental and customary uses to which single-family residences are put. The City does not purport to prohibit individuals from assembling in their homes for any purposes which are normal and customary in single-family residential areas; it does not attempt to restrict prayer in the home. The City does attempt to prohibit the operation of a church or synagogue in a residential

district. It does so in a neutral manner, prohibiting the operation of any church, synagogue, or organized religious center, regardless of belief or religious affiliation.

The ordinance is not void for overbreadth.

Application of §6-1 to Plaintiffs' Activities

Plaintiffs do not contend that the City lacks the power to restrict certain areas to single-family residences, or that it lacks the power to prohibit operation of various organized religious centers within those areas. Instead they assert that their activities do not constitute the use of their property as a synagogue, and that therefore the City's application of §6-1 as to their activities is unconstitutional.

The City contends that plaintiffs' activities constitute the use of their dwelling as a de facto church, and that plaintiffs have no fundamental right to do so. It further contends that the City has the right constitutionally to impose restrictions on the place of operation of organized religious centers.

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such. Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities. On the other hand, the Supreme Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for even when the action is in accord with one's religious convictions, it is not totally

free from legislative restrictions. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. *Sherbert v. Verner*, 374 U.S. 398, 402, 10 L.Ed.2d 965, 969 (1963).

The first determination that must be made is whether the application of §6-1 of the zoning code imposes a burden on the free exercise of plaintiffs' religion under the circumstances of this case. In my judgment it does.

While operation of a church in one's home may not amount to a fundamental right under the First Amendment, the right to pray in one's home does. Here, plaintiffs must choose between following the precepts of their religion in praying in their own home, on the one hand, and abandoning one of the precepts of their religion in order to escape criminal prosecution under the ordinance on the other. Imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed upon plaintiffs for conducting prayer in their own home. *See Sherbert v. Verner, supra.*, at 970, 971.

It is well established that a municipality may, through zoning ordinances, set aside districts which are restricted to particular uses. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 311 (1926).

However when such a legislative determination infringes upon a First Amendment right there must be some compelling state interest which justifies the substantial infringement of that right.

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert v. Verner, supra.*, at 972. [citation omitted]

The City has not asserted any such compelling interest in the present case. It has advanced the interests of zoning in the general welfare of the community, to avoid problems of traffic, noise, and litter; to prevent disturbances to neighboring families; and to avoid "spot zoning" and preserve a coherent land-use zoning plan. While those interests are substantial, and §6-1 bears a rational relationship to the goals espoused by the City, they are insufficient to warrant a substantial infringement of plaintiffs' religious liberties.

Accordingly, upon consideration of the record in the cause, it is

ORDERED AND ADJUDGED that summary judgment is hereby granted in favor of plaintiffs on the prayers for declaratory and injunctive relief.

The Court holds that Miami Beach City Ordinance No. 1891 §6-1 is unconstitutional as applied to the prayer assemblies which are conducted on plaintiffs' property to allow plaintiffs to follow the precepts of their religious beliefs.

Trial on the issue of damages will be set by further Order of this Court.

DONE AND ORDERED at Miami, Southern District of Florida, this 7th day of April, 1982.

/s/ Joe Eaton
United States District Judge

copies furnished:

Samuel I. Burstyn, Esq.
Diane Kuker, Esq.
Thomas Pflaum, Esq.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-5711

Non-Argument Calendar

D.C. Docket No. 82-06201

MARVIN SHUSTER, M.D., individually and
CONGREGATION LEVI YITZCHAK-CHABAD, INC.,
a Florida corporation not for profit,

Plaintiffs-Appellees,

versus

THE CITY OF HOLLYWOOD, FLORIDA,
a municipal corporation,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court for further proceedings not inconsistent with *Grosz v. The City of Miami Beach, Florida, et al.*, ____F.2d____, No. 82-5476 (11th Cir., December 19, 1983);

It is further ordered that plaintiffs-appellees pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: February 1, 1984
For the Court: Spencer D. Mercer, Clerk

By:/s/ [illegible]
Deputy Clerk

ISSUED AS MANDATE: MAR 21 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 82-6201-CIV-JAG

MARVIN SHUSTER, M.D., et al.,

Plaintiffs,

vs.

THE CITY OF HOLLYWOOD, FLORIDA, et al.,

Defendants.

ORDER

THIS CAUSE has come before the Court upon several pending motions. The Court has considered the motions, and being otherwise duly advised, it is

ORDERED AND ADJUDGED as follows:

1) That the Motion to Dismiss filed on behalf of the individual defendants, DAVID KEATING, STANLEY GOLDMAN, CATHLEEN ANDERSON, SUZANNE GUNSBURGER, JOHN WILLIAMS, JAMES CHANDLER, NANCY COUSINS, and A. S. KLUGER, be and the same is hereby GRANTED.

2) That the Motion to Dismiss filed on behalf of the Defendant, CITY OF HOLLYWOOD be and the same is hereby DENIED.

On May 7, 1982, the Court heard Plaintiffs' Motion for Preliminary Injunction. Plaintiffs are seeking to enjoin the Defendant CITY OF HOLLYWOOD from instituting or causing to be instituted criminal prosecutions against the Plaintiffs in connection with the exercise of their religious beliefs within their house.

The plaintiffs are members of an orthodox sect of the Jewish faith that requires them to pray twice daily in an assemblage of ten adult males. Plaintiff MARVIN SHUSTER is the owner of a house in Hollywood, Florida, which he and the Plaintiff CONGREGATION LEVI YITZCHAKCHABAD, INC., use for this purpose. The house is located in an area zoned for single family dwellings.

On March 3, 1981, Plaintiff SHUSTER was served with a Notice of Violation threatening Plaintiff SHUSTER with criminal prosecution, pursuant to Zoning Ordinance 967, Part 2, Subsection 3(B), if he did not cease operation of his house as a synagogue. The plaintiffs also received notification by mail from the City Attorney of the City of Hollywood, threatening legal action for any further use of the property as a "house of worship."

Plaintiffs allege that the application of the zoning ordinance to their religious activity deprives them of their rights of freedom of religion, speech, assembly, and the right of privacy in the home without fear of criminal prosecution or harassment under color of law.

Before the Court may issue an Order granting Plaintiffs' Motion for Preliminary Injunction, Plaintiffs must demonstrate satisfaction of the following four prerequisites:

1) A substantial likelihood that Plaintiffs will prevail on the merits;

2) A substantial threat that Plaintiffs will suffer irreparable injury if the injunction is not granted;

3) A threatened injury to Plaintiffs that outweighs the potential harm the injunction causes the Defendants; and

4) A finding that granting the preliminary injunction will not disserve the public interest.

Dallas Cowboy Cheerleaders v. Score Board Posters, 600 F.2d 1184, 1187 (5th Cir. 1979).

The Court finds that there is a substantial likelihood that the plaintiffs will prevail on the merits.

To determine the constitutionality of the application of the City of Hollywood's zoning regulations to the Plaintiff's religious activities under the free exercise clause, a two-step balancing test should be applied: 1) Has the state infringed upon the free exercise of religious beliefs? 2) If so, is the infringement justified by a compelling state interest? *See Sherbert v. Verner*, 374 U.S. 398 (1963).

By attempting to limit the areas wherein the plaintiffs may exercise their religious beliefs, and by further threatening criminal prosecution for the failure to adhere to the municipalities determination of where they may worship, the Defendant has substantially infringed upon the Plaintiffs' first amendment rights.

Because the Plaintiffs' religious beliefs require them to meet and pray twice daily and because they are prohibited from driving on the Sabbath, the Plaintiffs would be forced either to live in less desirable neighborhoods with commercial districts so they could exercise their religious beliefs free from state interference, or to abandon their religious precepts in order to escape criminal prosecution under the zoning ordinance. Governmental imposition of such a choice puts the same kind of burden on the free exercise of religious beliefs as would a fine imposed upon the Plaintiffs for their daily exercise of their religious beliefs. *See Sherbert v. Verner*, 374 U.S. at 404.

This is not to say that a municipality may not, through its zoning ordinances, set aside districts which are restricted to particular uses. However, when the state infringes upon a first amendment freedom, there must be a counterbalancing compelling state interest to justify the state's intrusion.

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

Sherbert v. Verner, 374 U.S. at 406 (citation omitted).

There is no such compelling state interest in this case. The state has advanced its paramount interest in the public safety, health, and welfare, through the exercise of its police power in the zoning area, as justification for its intrusion on the Plaintiffs' first amendment rights.

The state has attempted to show that there is an increase in traffic and noise in the Plaintiff's neighborhood. Although the state's interests are substantial, and bear a rational relationship to the zoning ordinance in question, they are not sufficient to warrant the substantial intrusion on the Plaintiffs' ability to exercise their religious beliefs.

Because this is a case involving an intrusion on first amendment rights, and there is a substantial likelihood that the Plaintiffs will prevail on the merits, the remaining three requirements for the issuance of a preliminary injunction have also been met.

The United States Supreme Court has held that "the loss of First Amendment freedom, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, it is implicit, when there is a threatened intrusion on first amendment rights, that the threatened harm to the Plaintiffs outweighs any harm the injunction may cause the Defendant, and that issuance of an injunction can only advance the public interest.

Accordingly, it is

ORDERED AND ADJUDGED that the Plaintiffs' Motion for Preliminary Injunction be and the same is hereby GRANTED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 12th day of May, 1982.

/s/ Jose A. Gonzalez Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX E

ZONING ORDINANCE 1891 OF THE CITY OF MIAMI BEACH

SECTION 6.

SCHEDULE OF DISTRICT REGULATIONS

6-1 RS-1, RS-2, RS-3, and RS-4 Single Family Residential Districts.

A. **DISTRICT PURPOSE.** These Districts are designed to foster and protect Miami Beach's single-family residential neighborhoods. The four Districts vary only in minimum lot area and lot width requirements.

B. **USES PERMITTED.** No land, water or structure may be used, in whole or in part, except for one or more of the following uses:

1. Single-family detached dwelling.

2. The following uses may be permitted as a conditional use:

   a. Municipally owned and operated recreation facility, playground, playfield, park or beach.

   b. Municipal buildings and uses.

   c. Temporary use for a period not to exceed 15 days.

3. Accessory uses for above uses.

APPENDIX F

PART II

SECTION 3(B) OF THE CODE OF THE CITY OF HOLLYWOOD

SECTION 3. USE REGULATIONS

[A] "RAA" Estate District.

(1) Single-family buildings and accessory buildings.

[B] "RA", "RB" Districts.

(1) Any use permitted in the "RAA" Estate District.

(2) Single-family buildings.

(3) Parks, playgrounds, or municipal buildings, owned and operated by the City of Hollywood, Florida.

(4) Golf courses.

(5) Accessory buildings, including a private garage.

83-1940

No.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1984

ARMIN GROSZ, SARA GROSZ and NAFTALI GROSZ,
Petitioners,

vs.

THE CITY OF MIAMI BEACH,
a municipal corporation,
Respondents.

MARVIN SHUSTER, M.D. and
CONGREGATION LEVI YITZCHACK-CHABAD, INC.,
Petitioners,

vs.

THE CITY OF HOLLYWOOD, FLORIDA
a municipal corporation,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF THE CITY OF HOLLYWOOD, FLORIDA IN OPPOSITION TO CONSOLIDATED PETITION FOR WRIT OF CERTIORARI

ROBERT M. KLEIN, ESQ.
Stephens, Lynn, Chernay, Klein & Zuckerman, P.A.
Suite 2400, One Biscayne Tower
Miami, Florida 33131
Counsel of Record

25pp

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A MUNICIPALITY MAY OCCASION INCIDENTAL RESTRICTIONS UPON THE FREE EXERCISE OF RELIGIOUS BELIEFS WITHOUT HAVING TO ADVANCE OR DEMONSTRATE A COMPELLING STATE INTEREST FOR DOING SO.

II.

WHETHER EXISTING CASE PRECEDENT SUPPORTS A MUNICIPALITY'S RIGHT TO REGULATE BOTH THE USE AND THE CHARACTER OF BUILDINGS WITHIN RESIDENTIAL NEIGHBORHOODS EVEN WHERE SUCH REGULATIONS MAY HAVE AN INCIDENTAL IMPACT UPON FIRST AMENDMENT FREEDOMS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

STATEMENT OF THE CASE

Shuster v. City of Hollywood

The City of Hollywood believes that it has been relegated to a more secondary role in this litigation, given the relative treatment which Petitioners have given to the City of Miami Beach/City of Hollywood cases, and the manner of resolution of the two appeals before the Eleventh Circuit Court of Appeals. Much of Petitioner's statement of the case and virtually all of Point I deal with the Grosz claim, and not with the Shuster matter. Similarly, while the Eleventh Circuit Court of Appeals wrote a lenghtly opinion in *Grosz*, the preliminary injunction was reserved in *Shuster* without an opinion, based upon the Eleventh Circuit's decision in the companion *Grosz* appeal.

While the City of Hollywood may believe that its summary treatment in this matter is well-deserved, given the nature of the claims that have been brought against the City by Dr. Shuster and Congregation Levi Yitzchack-Chabad, Inc., the City is nevertheless concerned that the Court is presently faced with the prospect of determining whether or not it will excercise jurisdiction over this cause where it has not had the benefit of a full factual summation. For this reason, the City of Hollywood believes that it would be appropriate to recount those facts which were presented by the City before the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit.

Plaintiff Marvin Shuster, M.D., has been a member of the orthodox Jewish faith for the past eight years. According to the tenets of his faith, Dr. Shuster must pray twice daily with ten adult males.

In October of 1980, Dr. Shuster purchased a house located in the City of Hollywood, at 1504 Wiley Street. This area of the City is classified as an "RA" district (Appendix F, Petitioner's Brief), which is zoned for single-family buildings, parks, playgrounds, municipal buildings, golf courses and accessory buildings.

Dr. Shuster did not purchase the Wiley Street house as a residence. Rather, the house was purchased so that Dr. Shuster and ten other adult males would have a place to pray, i.e., the building was to serve as a house of worship. During the hearing on Plantiffs' Motion for a Preliminary Injunction, counsel for Dr. Shuster and the Congregation stipulated that the inside of the house bore all of the indicia of a synagogue--a Jewish house of worship.[1] Houses of worship are not permitted in a RA district. (R 12)

In December of 1980, the Congregation hired a rabbi, Rabbi Tennenhaus, to perform religious services at the Wiley Street house. The Rabbi is paid $25,000 yearly pursuant to a written contract, which was entered into in December of 1981. The Rabbi maintains an office and conducts services twice daily at the Wiley Street location. He has also conducted a bar mitzvah (a confirmation cremony for 13 year old Jewish males) and classes on Judaic subjects at the house. The Rabbi is required to perform such functions at the house pursuant to his contract with the Congregation.

[1]In fact, there has never been any real doubt about the fact that this house was being operated as a house of worship. While Petitioners have denied that they were operating an organized religious center in the Grosz home, there have been no similar denials with regard to the house on Wiley Street. "In the *Shuster* case, Petitioners agree that the structure was fairly characterized as a synagogue." CONSOLIDATED PETITION FOR WRIT OF CERTIORARI, page 12 at Note 4.

On or about March 3, 1981, Dr. Shuster was served with a Notice of Violation, stating that "a church (synagogue) is not a permitted use in the RA Single-Family residential district." Plaintiffs were given five days to correct this situation. (R 13)

On March 10, 1981, Dr. Shuster applied for a Use/Density Variance "to permit a synagogue in a Single-Family residential zone." (R 55) The City granted a temporary variance for a period of six months, or until October 15, 1981.

Several months later (on July 1, 1981), Congregation Levi Yitzchack-Chabad was incorporated. A. Louis Goldfarb was named as the Congregation's President and Resident Agent. According to the Articles of Incorporation filed by the Congregation, one of the purposes of the corporation is to attract new members for the Congregation. The Congregation pays the utility bills incurred at the Wiley Street address, and has business cards which reflect that same address. The Congregation has also placed advertisements in local newspapers and a listing in the Yellow Pages of the area phone directories (under "Synagogue") which give the Wiley Street address and the telephone number of the Congregation.

During the week, religious services are conducted at the Wiley Street house twice daily, for one hour in the morning and an hour and a half in the evening. Saturday services run for three hours in the morning and two and one half hours in the evening. According to testimony which was received from the Congregation's president, approximately 10 to 15 people attend the weekly services, while 20 to 30 people generally attend on Saturdays.

According to a neighbor, there has been a increase in motor vehicle and pedestrian traffic since the Congregation began using the Wiley Street house. At the hearing on the preliminary injuction, Bruce Black testified that he had observed between 15 and 20 people at the home between 7:00 a.m. and 9:00 a.m. on weekday mornings and during the afternoon between 4:00 p.m. and 6:00 p.m. On Saturdays, Mr. Black would ordinary observe some 25 to 30 people going into the house.

Mr. Black was also able to testify concerning the fact that some 10 to 15 cars would generally be parked in the immediate vicinity when services were being conducted. In addition, cars would occasionally discharge passengers in front of the house immediately prior to services.

In Petitioners' Statement of the Case, Dr. Shuster and the Congregation note that the Wiley Street house was "used for prayer by members of Dr. Shuster's sect of Judaism who would not otherwise have been able to practice their religious beliefs." Apparently, this statement is predicated upon Petitioner's earlier pronouncements to the effect that their "religious beliefs preclude them from driving on the Sabbath, or from walking great distances on that day." (CONSOLIDATED PETITION FOR WRIT OF CERTIORARI at pages 8-9) In fact, a zoning map which was entered into evidence at the hearing on Plaintiffs' Motion For a Preliminary Injuction clearly indicated that a house of worship is a permitted use within walking distance of the house on Wiley Street.

On October of 1981, Dr. Shuster and the president of the Congregation appeared at a City Commission meeting, to request an extension of the temporary variance. Both gentlemen testified that the Congregation would be looking for other quarters. Accordingly, the City extended the variance for a period of four (4) months, or until February

15, 1982. On February 25, 1982, the City informed the Congregation that its variance had expired, and advised the Congregation that any further use of the premises at 1504 Wiley Street as a house of worship would be in violation of the Zoning and Development Code of the City of Hollywood. (R 14)

On April 6, 1982, Dr. Shuster and the Congregation filed a Complaint against the City of Hollywood and various employees or agents of the City. (R 1 through 14) (The remaining Defendents were dismissed either by order of the District Court, or by Petitioners' counsel.) At the same time, Petitioners filed a Motion for Emergency Filing of Complaint and Immediate Assignment (R 15 through 16), a Motion for Temporary Restraining Order (R 19 through 23), and Motion for Preliminary Injunction (R 29 through 38). The Motion for Temporary Restraining Order was denied on April 6, 1982 (R 64).

The hearing on the Motion for Preliminary Injunction was held on May 7, 1982. At the hearing on the Motion, counsel for Dr. Shuster and the Congregation stipulated that the president of the Congregation maintains a book which contains the names of members of the Congregation, and the names of members who have contributed to the Congregation. Petitioners' counsel also stipulated that the Congregation maintains an advertisement in the Yellow Pages of the local phone directory. The parties also stipulated to a proffer of testimony from several zoning officials for the City of Hollywood.

According to a stipulated proffer of testimony from Bob Davis, director of Growth Management for the City, the Wiley Street location was inappropriate for use as a house of worship, and had been a single-family home for approximately twenty (20) years before Dr. Shuster's

purchase. According to Mr. Davis, the lot size at 1504 Wiley Street was inappropriate for a synagogue, and the amount of available parking was grossly inadequate given the square footage of the home. City zoning standards ordinarily would have required 17 parking spaces for a house of worship which was the size of the building on Wiley Street, whereas there were only three parking spaces on Dr. Shuster's property.

The City also presented a stipulated proffer of testimony from Howard Stottlemeyer, a code enforcement officer who regularly inspects for zoning violations. According to Mr. Stottlemeyer, the City had served Notices of Violation on two other religious groups which had attempted to conduct services in homes which were within RA districts. Both groups voluntarily removed themselves from those zoning districts. Another code enforcement officer testified by proffer that he had called the telephone number listed in the Yellow Pages, and that he had been advised by the Congregation's president that dues for membership in the Congregation were $180.00 per year, per family.

On May 12, 1982, Judge Gonzalez entered an order granting Plaintiffs' Motion for Preliminary Injunction. A Notice of Interlocutory Appeal from that Order was filed on June 11, 1982. On February 1, 1984, Judgment was entered by the United States Court of Appeals for the Eleventh Circuit, reversing the District Court's Order on the Petitioner's Motion for Preliminary Injunction, and the case was remanded to the District Court for further proceedings not inconsistent with *Grosz vs. City of Miami Beach*. Petitioners' consolidated Petition for Writ of Certiorari was timely filed after the issuance of the Eleventh Circuit's mandate.

ARGUMENT

POINT I

A MUNICIPALITY MAY OCCASION INCIDENTIAL RESTRICTIONS UPON THE FREE EXERCISE OF RELIGIOUS BELIEFS WITHOUT HAVING TO ADVANCE OR DEMONSTRATE A COMPELLING STATE INTEREST FOR DOING SO.

The City of Hollywood has modified the initial question which was presented by Petitioners for review, in light of a somewhat different perception of the issues that have been presented in this matter since the inception of litigation. These perceptual differences have only been compounded by Petitioners' presentation in Point I, which makes no reference whatsoever to the City of Hollywood or the *Shuster* matter. Nevertheless, while it may well be that Petitioners did not intend to direct the arguments in Point I to both the City of Miami Beach and the City of Hollywood, the City of Hollywood feels compelled to respond to the arguments raised by Point I of the Consolidated Petition for Writ of Certiorari.

In that regard, the City of Hollywood would initially note that the Eleventh Circuit has never affirmed a municipality's right to prevent an individual from praying at home. Home prayer is not and has not been an issue in these consolidated actions. Rather, both cases involve a municipality's right to impose indirect "time, place and manner" restrictions upon the free exercise of religious belief as a result of the application of an otherwise non-sectarian zoning law. See *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.* vs. *City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir. 1983), *cert. denied* 104 S.Ct.72, 78 L.Ed.2d (1983).

To that extent, the Eleventh Circuit's rulings in the *Shuster* and *Grosz* actions were entirely consistent with prior case precedent emanating from this Court and the other circuit courts of appeal. Thus, while it may well be that this Court has never issued any precise pronouncements which have expressly sanctioned application of municipal zoning ordinances in such a manner as to cause some kind of indirect or incidental burden upon the free exercise of religious beliefs, review by certiorari would be unwarranted given the lack of any real conflict or confusion in this area. This opinion is buttressed by the Court's decision to deny certiorari in several similar cases.

Sherbert vs. *Verner*, 374 U.S. 398, 10 L.Ed.2d 965,83 S.Ct. 1790 (1963), undoubtedly stands for the proposition that a governmental entity may not be allowed to *substantially burden* the free exercise of religious beliefs absent some compelling state interest. Yet *Sherbert* and its progeny certainly should not serve as a basis for an exercise of this Court's discretionary jurisdiction where there clearly has been no "substantial infringement" of the First Amendment rights of any of the Petitioners herein.

In this instance, enforcement of the City of Hollywood's zoning ordinances would in no way require Dr. Shuster or the Congregation to abandon any of the precepts of their religion. They will simply be required to relocate the synagogue several blocks away, and to walk an additional three blocks to services.[2] Under the circumstances, the kind of

---

[2] In the *Grosz* case, the Eleventh Circuit noted that the City of Miami Beach's zoning regulations permitted organized, publicly attended religious activities in all zoning districts except the RS-4 single-family districts. The zones which allow organized religious activity constitute one half of the City's territory. The Grosz family lived within four blocks of such a district. (Appendix A to Consolidated Petition for Writ of Certiorari, at App.22.)

substantial infringement which justified the required showing of a compelling state interest in *Sherbert* is absent in this instance.

The City of Hollywood would submit that this case is more closely analogous to those decisions which have sustained governmental regulations which have had an incidental impact upon the free exercise of First Amendment freedoms. *See, e.g., Young* vs. *American Mini Theaters, Inc.*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976); *United States* vs. *O'Bryan*, 391 U.S. 367,20 L.Ed.2d 672,88 S.Ct. 1673 (1968); *Braunfeld* vs. *Brown*, 366 U.S. 599,6 L.Ed.2d 563,81 S.Ct. 1144 (1961). The decisions in such cases indicated that a governmental entity need not demonstrate a compelling interest in the formulation or enforcement of a secular statute or ordinance where the legislative enactment in question will only incidentally burden the exercise of First Amendment rights.

In the opinion for the Court in the *Grosz* matter, Judge Goldberg reviewed all of the cases which have been cited by the parties to this matter, and concluded that it was ultimately up to the reviewing Court to strike a "proper, final balance of free exercise and government interest." (Appendix A to Consolidated Petition for Writ of Certiorari, at App. 19). This conclusion does not conflict with applicable decisions of this Court or other federal courts of appeal. To the contrary, the opinions in *Grosz* and *Shuster* are completely harmonious with similar or analogous decisions from both this Court and the other federal courts of appeal. And it certainly cannot be said that the decisions in *Grosz* and *Shuster* conflict with decisions on this issue which have emanated from the Florida Supreme Court, since the Florida Supreme Court has ruled that the City of Miami Beach has the power to regulate the location of

churches, and to otherwise preclude organized group religious activity where such activity does not fall within the parameters of that type of conduct which is allowed in zoned residential neighborhoods. *Jacquelyn Town* vs. *State*, 377 So.2d 648 (Fla. 1980).

It is worthy of note that this Court denied certiorari in the *Town* matter. *Town* vs. *Reno*, 449 U.S. 803, 66 L.Ed.2d 7, 101 S.Ct.48 (1980). That result would appear to be entirely consistent with both prior case precedent and this Court's recent decision to deny certiorari to the United States Court of Appeals, Sixth Circuit, in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.* vs. *City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 78 L.Ed.2d. 85, 104 S.Ct. 72 (1983). In the *Lakewood, Ohio* case, the Sixth Circuit had affirmed the constitutionality of a comprehensive municipal zoning plan which prohibited the construction of houses of worship in certain areas of the City.

This Court has rejected other similar constitutional challenges in an indirect fashion. In *Corporation of Presiding Bishop* vs. *City of Porterville*, 203 P.2d 823 (Cal.App.1949), a California appellate Court ruled that the City of Porterville could enforce a municipal zoning ordinance which precluded the construction of houses of worship in certain enumerated residential areas. The Plaintiffs appealed to the United States Supreme Court, which dismissed the appeal for want of a substantial Federal question. *Corporation of Presiding Bishop* vs. *Porterville*, 338 U.S. 805, 94 L.Ed. 487, 70 S.Ct. 78 (1949). In an opinion later that same year, the *Porterville* Court explained the basis for that dismissal:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas. *American Communications Association* vs. *Douds*, 339 U.S. 382, 397, 94 L.Ed. 925, 940, 70 S.Ct. 674, 689 (1950).

Thus, on three separate occasions this Court has refused to consider challenges to municipal ordinances which regulated the location of houses of worship. If this kind of regulation fails to present a substantial Federal question, it is difficult to understand how the City of Hollywood's virtually identical zoning ordinance could be deemed to unconstitutionally abridge the First Amendment freedoms of Dr. Shuster and the Congregation, or to otherwise provide a basis for an exercise of this Court's discretionary jurisdiction.

POINT II

EXISITNG CASE PRECEDENT SUPPORTS A MUNICIPALITY'S RIGHT TO REGULATE BOTH THE USE AND THE CHARACTER OF BUILDINGS WITHIN RESIDENTIAL NEIGHBORHOODS EVEN WHERE SUCH REGULATIONS MAY HAVE AN INCIDENTAL IMPACT UPON THE FIRST AMENDMENT FREEDOMS.

The City of Hollywood has rephrased Petitioners' Point II, based predominantly upon the City's belief that even a cursory examination of the opinion in *Grosz* will readily reflect that the Court of Appeals did not determine that the Respondent Cities could exclude religious activity from residential neighborhoods based solely upon those same standards which are used to exclude commercial enterprises from residential districts. Rather, the City of Hollywood believes that both panels of the Eleventh Circuit properly applied existing precedent, which supported their attempts to balance what were perceived as substantial infringements upon existing zoning policy with what may truly be characterized as incidental "time, manner and place restrictions on religion". (Appendix A to the Consolidated Petition for Writ of Certiorari, App. 26.)

In his decision in *Grosz*, Judge Goldberg noted that this Court had previously upheld the convictions of a Jehovah's Witness for violating child labor laws. *Prince* vs. *Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944). In *Prince*, the Court held that a state's interest in protecting the welfare of its children was sufficient to allow the State of Massachusetts to wholely prohibit children from selling religious literature on city streets. However, as

was noted by Judge Goldberg, while the *Prince* Court observed that the State of Massachusetts could not completely prohibit *adults* from distributing religious literature, distribution of literature could be regulated "within reasonable limits" in order to accommodate the primary uses of the city streets. (Appendix A to the Consolidated Petition for Writ of Certiorari, App. 24; 321 U.S. at 169, 64 S.Ct. at 443.) Thus, there can be little doubt about the fact that this Court has previously endorsed the use of a state's police power to advance a substantial state interest, even where the net effect would be to impose "time, manner and place restrictions on religion."

Petitioners concede that the commercial uses of property can be regulated through the implementation of a general zoning scheme if a municipality's comprehensive zoning plan is designed to promote the health and well-being of municipal citizens, i.e., if the zoning ordinances are rationally related to some legitimate municipal purpose. *Euclid* vs. *Ambler Realty Company*, 272 U.S. 365, 71 L.Ed 303. 47 S.Ct. 114 (1926). Petitioners also concede that comprehensive zoning plans may include restrictions upon religious structures which do not conform to local zoning regulations. *See Corporation of the Presiding Bishop* vs. *City of Porterville*, supra, as explained in *American Communications Association* v. *Douds*, supra. Yet Petitioners then attempt to suggest that the Eleventh Circuit's decision in this matter is some kind of aberration, simply because Dr. Shuster did not modify or alter any of the external features of the house on Wiley Street before (or after) it was converted into a formal house of worship. The City of Hollywood believes that these are distinctions without a jurisprudential difference.

Dr. Shuster and the Congregation have misconstrued the purpose of zoning regulations. Zoning laws are not designed solely to govern the *appearance* of structures within a given district. Rather, as the Court noted in *Village of Belle Tere* v. *Boraas*, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974), single-family residential zoning may be used to preserve the "quiet seclusion" which results where the "yards are wide, people few, and motor vehicles restricted . . . . " *Village of Belle Terre*, 416 U.S. at 9. In fact, given the character of the single-family residential neighborhood, the actual appearance of neighborhood structures may often be one of the least important goals which a municipality may seek to achieve through implementation of its master zoning plan.

In his Order granting a Preliminary Injunction in favor of Dr. Shuster and the Congregation, Judge Gonzalez noted that the City of Hollywood had a substantial interest in protecting the sanctity of its residential neighborhoods, and that the City's concerns over the increase in traffic and noise in the Wiley Street neighborhood bore a rational relationship to the zoning ordinance in question. No other conclusion could have been drawn, given the substantial, increased traffic in the neighborhood as a result of services at the synagogue, and in light of the fact that the amount of available parking was grossly inadequate.

The City of Hollywood believes that it was entitled to use its zoning laws to protect the sanctity of a residential neighborhood which had existed in substantially the same condition for some 20 years prior to the purchase of the house on Wiley Street by Dr. Shuster. The City did not use its zoning authority to exclude religion *per se* from this

residential district. Rather, the City simply sought to enforce its zoning code in order to prohibit the use of a home in a residential district as a formal house of worship, where the City had previously determined that both the neighborhood and the house itself were inadequate or unsafe for that purpose, given the character of the surrounding neighborhood.

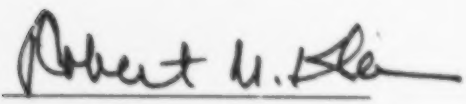
The City's decision to enforce its zoning laws was no different then the decisions which were made by the City of Porterville or the City of Lakewood when those municipalities decided to prohibit the construction of formal houses of worship in residential neighborhoods. Nor can the City of Hollywood's decision to enforce its zoning regulations be distinguished from similar efforts by the City of Miami Beach to preclude Jacquelyn Town from using her residence as a center of operations for the Ethiopian Zion Coptic Church. This Court denied certiorari in each of those instances. Certiorari should also be denied in this case.

CONCLUSION

The United States Court of Appeals for the Eleventh Circuit correctly applied existing precedent in resolving the *Grosz* and *Shuster* matters. The law in this area does not need clarification, as has been demonstrated by this Court's decision not to grant certiorari in prior, similar actions. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STEPHENS, LYNN, CHERNAY,
KLEIN, & ZUCKERMAN, P.A.
Counsel of Record for
City of Hollywood
Suite 2400
One Biscayne Tower
Miami, Florida 33131

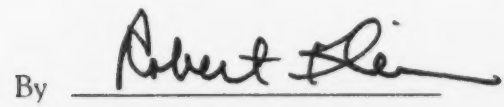
By 

ROBERT M. KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Brief in Opposition to Consolidated Petition for Writ of Certiorari was served by United States Mail, postage prepaid, to: Michel Ociacovski, Esq., Samuel I. Burstyn, P.A., Suite 200, 3050 Biscayne Boulevard, Miami, Florida 33137; and Jessee L. McCrary, Jr., Esq., Eighth Floor, 3050 Biscayne Boulevard, Miami, Florida 33137, counsel for Petitioners, on this 22nd day of June, 1984.

STEPHENS, LYNN, CHERNAY
KLEIN, & ZUCKERMAN, P.A.
Suite 2400
One Biscayne Tower
Miami, Florida 33131
Counsel of Record for
City of Hollywood

By 
ROBERT KLEIN

No. 83-1940

In the Supreme Court of the United States

October Term, 1983

ARMIN GROSZ, SARAH GROSZ and NAFTALI GROSZ,
Petitioners,

vs.

THE CITY OF MIAMI BEACH,
a municipal corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT CITY OF MIAMI BEACH IN OPPOSITION

THOMAS MARTIN PFLAUM, ESQ.
Counsel of Record
SIMON, SCHINDLER & HURST, P.A.
1492 S. Miami Avenue
Miami, Florida 33130
(305) 358-8611

LUCIA ALLEN DOUGHERTY
City Attorney
JEAN KRONHEIM
Assistant City Attorney
1700 Convention Center Drive
Miami Beach, Florida 33139
(305) 673-7470

Attorneys for City of Miami Beach

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

The question presented by the petition is whether, under the particular facts of this case, the City of Miami Beach had the right to enforce its zoning law to stop Petitioners from using their home as a synagogue in a single-family residential area of the City.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

No. 83-1940

In the Supreme Court of the United States

October Term, 1983

ARMIN GROSZ, SARAH GROSZ and NAFTALI GROSZ,
Petitioners,

vs.

THE CITY OF MIAMI BEACH,
a municipal corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT CITY OF MIAMI BEACH IN OPPOSITION

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is contained in Petitioners' Appendix pp. 1-27. The opinion of the District Court is contained in Petitioners' Appendix pp. 28-40.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1983. Petitioners filed a Petition for Rehearing and *en banc* consideration which was denied by the Eleventh Circuit on February 28, 1984. The jurisdiction of this Court has been invoked by Petitioners under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The First Amendment to the United States Constitution:

I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. The City of Miami Beach Zoning Ordinance 1891 has been set forth in Petitioners' Appendix "E".

STATEMENT OF THE CASE AND THE FACTS

Petitioners' statement of the facts is unsupported by the Record. Petitioners have made assertions of fact which are contrary to their stipulation of the facts below.

Petitioners stipulated below that the prayer services they conducted at their home were for reasons of personal convenience as opposed to religious belief (see paragraph 5 of the stipulation); they now seek to evade that stipulated fact by asserting, for the first time, that they are precluded from driving or walking "great distances" on the Sabbath, an assertion which is not supported by the Record. The stipulated facts are that Petitioners were *not* immobile and could lawfully operate their synagogue only four blocks from their home. Moreover, as shown in greater detail below, Petitioners asserted no religious need except to pray twice-daily in the company of ten adult males, which the City has never objected to (R-1, 2; 51, 390); Petitioners therefore do not have to travel at *all* to satisfy their relig-

ious needs. (In fact, Petitioners even stipulated below that there was no *religious* reason for holding their daily minyan services in their home, but the City has never objected to those services anyway.)

Petitioners' statement that the use of their home as a synagogue was necessary as a matter of religious belief is therefore contrary to the stipulated facts. Petitioners stipulated that they were not required by their religious beliefs to engage in the activities which the City of Miami Beach sought to stop. Paragraphs 5, 6 and 9 of the stipulation reveal that the City sought *only* to stop Petitioners from doing that which Petitioners *acknowledged* was not required by their religious beliefs; the City did not seek to stop Petitioners from doing that which Petitioners asserted a religious need to do, or even from doing that which Petitioners admitted they had no religious need to do. Indeed, the truth is that Petitioners stipulated below that there was no case or controversy at all between the parties, since the City was not objecting to *anything* Petitioners asserted a desire to do, and since Petitioners admitted they were doing what they had no religious or other need to do. Stipulation, paragraphs 5, 6, and 9. Accordingly, when Petitioners state to this Court that they "demonstrated" a religious need to conduct their services in the home, they are contradicting their own stipulation and their own expert witness on religion who testified that Petitioners had no religious reason or need at all to operate their home as a synagogue.

Petitioners also misrepresent the facts when they assert that they were not using their home as a center of organized religious activity. The *stipulation* describes what Petitioners were doing and is confirmed and amplified by the testimony and evidence in the Record showing that Petitioners were operating a synagogue in their home:

—Petitioners were not in fact praying in the company of "ten relatives or neighbors", as Petitioners had alleged in their lawsuit, but rather were conducting twice-daily religious services, attended by up to *fifty* or more persons, many of whom were strangers and non-residents using the facility as their principal place of worship in the City, in a structure specifically remodeled, equipped and used as a synagogue. Stipulation, paragraphs 3 and 6; R-1, and 2.

—Petitioners solicited persons off the street to attend the services and accepted contributions from the participants. Stipulation, paragraphs 3, 5, 6 and 7; Armin Grosz deposition, pp. 18, 28.

—Petitioners and the parties' witnesses repeatedly referred to the Petitioners' congregation as a "Shul" or synagogue. Stipulation, paragraph 6; R-383; A. Grosz deposition, pp. 20-21, 62; N. Grosz deposition, pp. 28, 30.

—Petitioner knowingly purchased the home in the *only* zone of the City which was exclusively for single-family residential use and which excluded churches and synagogues. After being specifically told by the City that they could not use the home as a synagogue, Petitioners remodeled the interior of the structure as a synagogue after procuring a building permit from the City with the misrepresentation that they intended to use the structure as a "playroom". Stipulation, paragraphs 2 and 3.

—Petitioners conducted religious services in the facility twice a day, every day of the year, and each service lasted between one-half hour and three hours. Stipulation, paragraph 7.

—Naftali Grosz is the leader of an orthodox Jewish sect and uses the structure to lead his sect's services. Stipulation, paragraph 5.

Petitioners' representation that the evidence "demonstrated" that they were not using the home as a center of organized religious activity is thus totally contrary to the Record and contrary to Petitioners' own stipulation of the facts.

Finally, it is inaccurate for Petitioners to state that the Court of Appeals advanced no compelling state interest for mandating that the Petitioners be required to give up their religious practices. Rather, the Circuit Court held that under the stipulated facts, Petitioners' religious needs had not been impaired. That being the case, the City's interest in enforcing its zoning ordinance plainly outweighed Petitioners' demand to make unbridled use of their property as a synagogue.

ARGUMENT

This Court should not take jurisdiction in this case for the very simple reason that Petitioners never suffered any infringement of their First Amendment rights, much less a substantial or significant infringement.

Petitioners argue that the Court of Appeals failed to follow this Court's precedent by not requiring the City to demonstrate a compelling interest in having a zoning plan which preserves one area of the City for exclusively residential purposes. Petitioners failed, however, to show how the restriction under the City's zoning law actually burdened their freedom of religion. *See*

Abington v. Schempp, 374 U.S. 202 (1963); *Wilson v. Block,* 708 F.2d 735, 740 (D.C.C. 1983): "Only if a burden is proven does it become necessary to consider whether the governmental interest is compelling . . .". Petitioners failed to show any substantial or even significant infringement of their religious beliefs due to the government's refusal to permit them to use their home as a synagogue in the *only* area of the City prohibiting that conduct. On the contrary, Petitioners stipulated and the facts demonstrated that the City's enforcement of its zoning law did not impair any central or fundamental element of Petitioners' religion. In fact, the parties stipulated that the City's action did not constitute an intrusion on Petitioners' religious beliefs or practices at all. *Lakewood Ohio Congregation of Jehovah's Witnesses v. City of Lakewood,* 699 F.2d 303, 305-306 (6th Cir. 1983), *cert. den.,* 104 S.Ct. 72 (1983). As they alleged in their complaint, Petitioners unquestionably believe that twice-daily they must hold a minyan (a prayer service requiring ten adult males) and the City has never objected to that practice even if it occurred in Petitioners' home, even though Petitioners admitted that while it is more personally convenient for them, there is no religious reason for preferring to conduct the minyan in the home. The City only objected to Petitioners operating a *synagogue* in their home, in the manner described by the stipulation and the Record. At first Petitioners denied operating a religious center in the home, but the facts were clear and ultimately Petitioners signed a stipulation describing the facts and admitting they had *no religious reason at all* to engage in such conduct in their home. Petitioners conceded that nothing the City sought to prevent Petitioners from doing was central or indis-

pensable to Petitioners' religion. *Sequoyah v. TVA*, 620 F.2d 1159, 1164 (6th Cir. 1980).[1]

Government interference with personal preference cannot constitute a substantial infringement on religious rights which requires the City to show a compelling justification for its law.

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. The statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday or Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

Braunfeld v. Brown, 366 U.S. 599, 606 (1961). Personal preference and individual convenience can hardly be a justification for the issuance of a "First Amendment variance" to every private association, religious or political group, commune or publishing company wishing to operate in a private home, especially where as here the City *specifically* authorizes such activities virtually everywhere

---

1. The Court in *Sequoyah* concluded that the flooding of the Little Tennessee Valley, while depriving the Cherokee Indians of the ability to worship there, did not deprive them of a geographic location "indispensable" or "central" to the Indians' religious observances. *Sequoyah* at 1164.

else within the City.[2] *See Young v. American Mini Theaters,* 427 U.S. 50 (1976); *Grayned v. City of Rockford,* 408 U.S. 102, 115 (1972), regarding reasonable time, place and manner regulations in furtherance of significant government interest. See also *Holy Spirit Association, etc. v. Town of Newcastle,* 480 F.Supp. 1212 (S.D.N.Y. 1979).

Even if Petitioners had asserted and shown that there was special religious significance in the use of their home for the purposes they were using it, which they stipulated was not the case, the City's demand that they engage in such operations elsewhere in the City would not be a substantial infringement on Petitioners' First Amendment rights. *See Wisconsin v. Yoder,* 406 U.S. 205 (1972) (criminal penalties); *Sherbert v. Verner,* 374 U.S. 398 (1963) (withholding of crucial economic benefits). Petitioners' brief must be viewed against the background of over thirty years of state and federal case law upholding, against similar freedom of religion claims, local zoning laws which in some instance totally excluded churches or parochial schools from large portions of the City. As noted above, here it is a stipulated fact that Petitioners could freely and unconditionally operate in at least 12 other zones of the City, including *any other residential* zone of the City and including an area less than 4 blocks from their home. Compare *Chico v. First Avenue Baptist Church,* 238 P.2d 587 (Cal. App. 1951)

---

2. The Stipulation and Record reflects that *every other* commercial, mixed-use and residential zone of the City of Miami Beach unconditionally permits the operation of churches and synagogues, including every purely residential zone of the City except for the *one* zone Petitioners selected to use as a religious center. As shown by the Stipulation and the Record, well over 50% of the City is unconditionally zoned to allow the operation of churches and synagogues (including an area of the City four blocks from Petitioners' home.) R-293, 295.

and *Corporation of Presiding Bishops v. Porterville,* 203 P.2d 823 (Cal. App. 1949), *app. dism'd,* 338 U.S. 805 (1949), with *Ellsworth v. Gercke,* 156 P.2d 242 (Ariz. 1945) and *Englewood v. Apostolic Church,* 362 P.2d 172 (Colo. 1961). See also *Town v. State ex rel. Reno,* 377 So.2d 648 (Fla. 1980), *cert. den.,* 101 S.Ct. 48 (1980), involving facts which are conceptually indistinguishable from those present here.

The Supreme Court's position on a state's decision to permit its local government to exclude churches from residential neighborhoods is best seen in *Corporation of Presiding Bishops, etc., supra,* in which this Court dismissed an appeal, for want of a substantial Federal question, from a state Supreme Court decision upholding an ordinance excluding churches from a residential zone of a City. This Court later explained:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedom is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nations is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.

American Communications Association v. Douds, 339 U.S. 382, 397-398 (1950). See also *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9 (1974).

With respect to Point II of Petitioners' brief, concerning the application of local zoning laws to the *use* as opposed to the *outward appearance* of property, that issue was never raised by Petitioners in the courts below.

Petitioners state that because the facade of their home complied with the zoning restrictions, this case is "novel" in that the structure involved is "entirely conforming to the applicable zoning regulations". There is nothing "novel" in a City zoning law applying to the use of property; indeed all zoning laws do so and the Miami Beach law does too. (The law at issue here specifically applies to "single-family, residential and accessory *uses*".) *See Palo Alto Tenants' Union v. Morgan,* 487 F.2d 883 (9th Cir. 1973), *cert. den.,* 94 S.Ct. 2608 (1974), and *Village of Belle Terre, supra.*

CONCLUSION

The Petition for a Writ of Certiorari should be denied, because the Court of Appeals followed the precedents of this Court in reaching its opinion. As such, jurisdiction for consideration of this case is lacking.

Respectfully submitted,

THOMAS MARTIN PFLAUM, ESQ.
Counsel of Record
SIMON, SCHINDLER & HURST, P.A.
1492 S. Miami Avenue
Miami, Florida 33130
(305) 358-8611

and

LUCIA ALLEN DOUGHERTY
City Attorney
JEAN KRONHEIM
Assistant City Attorney
1700 Convention Center Drive
Miami Beach, Florida 33139
(305) 673-7470
Attorneys for City of Miami Beach

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent this 12th day of July, 1984 to SAMUEL I. BURSTYN, ESQ., 3050 Biscayne Blvd., Suite 200, Miami, Fl. 33137; JESSE L. McCRARY, JR., ESQ., 3050 Biscayne Blvd., 8th Floor, Miami, Fl. 33137; CHRISTINE P. TATUM, ESQ., Asst. City Attorney, City of Hollywood, 2600 Hollywood Blvd., Hollywood, Fl. 33020, and ROBERT KLEIN, ESQ., Two South Biscayne Boulevard, One Biscayne Tower, Suite 2400, Miami, Florida 33131.

By THOMAS M. PFLAUM, ESQ.
Counsel of Record